Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

MOVERS AND WAREHOUSEMEN'S ASSOCIATION OF METROPOLITAN WASHINGTON, D. C., INC. AND ITS EMPLOYER MEMBERS:
BEKINS MOVING & STORAGE CO.
COLONIAL STORAGE CO.
DISTRICT MOVING & STORAGE CO.
FIDELITY STORAGE CO.
LIONS TRANSFER CO.
MERCHANTS STORAGE CO. OF VA.
COLUMBIA VAN LINES CORP.
SECURITY STORAGE CO. OF WASHINGTON
SMITH'S MOVING & STORAGE CO., INC.
UNITED STATES MOVING & STORAGE CO., INC.
Petitioners,

76-1649

v.

NATIONAL LABOR RELATIONS BOARD
Respondent,

and

LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD
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LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Movers and Warehousemen's Association of Metropolitan Washington, D. C., Inc. and its employer members hereby request the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 23, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, dated February 23, 1977, is reported at 94 1RRM 2795 and is reprinted at Appendix page 1a.

The decisions of the National Labor Relations Board and the Administrative Law Judge dated June 3, 1976 and September 15, 1975, respectively, are reported at 224 NLRB No. 64 and are reprinted at Appendix pages 10a and 25a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered February 23, 1977. The petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a National Labor Relations Board backpay remedy effectuates the remedial purposes of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. Section 160(b) and (c), when based solely on a conclusive evidentiary presumption that an unfair labor practice existing only at the beginning of a lockout renders the entire lockout unlawful, regardless of intervening events.

2. Whether the National Labor Relations Board's conclusive presumption of a lockout's continued illegality is an improper intrusion on the economic weapons of collective bargaining parties.

3. Whether an agency which conclusively presumes facts necessary to establish a respondent's liability denies respondent its due process right to effectively present rebuttal evidence.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. Section 158(a)(1), (3), and (5), and Section 160 (b) and (c) are set forth at Appendix page 56a.

STATEMENT OF THE CASE

Petitioners formed the Movers and Warehousemen's Association of Metropolitan Washington, D. C., Inc. as a multi-employer association for purposes of collective bargaining with IBT Local 639. The Association has been the bargaining entity since 1972.

The moving industry in Washington, D. C. is a seasonal business with the summer-fall season from May 15 to October 15 being busiest. Business volume rises approximately two to three-fold during the busy season.

Petitioners and IBT Local 639 began bargaining for the 1975 contract during March, 1975.[1] The existing contract was to expire on March 31.

At the first three collective bargaining meetings, the parties reached agreement on nearly all matters ex-

[1] Unless otherwise noted, all dates are in 1975.

cept wage rates and the duration of the contract. On March 25, the last collective bargaining session before contract termination, the parties remained far apart on contract duration and wage rates. Petitioners promised to place their final offer in writing.

The Union then demanded that any contract settlement occurring after termination of the existing contract be retroactive. It threatened to strike Petitioners if the Union's retroactivity demand were not met.

Petitioners questioned the need for any commitment on retroactivity because there were yet three working days before contract expiration in which the Union could give the employers' final proposal to the membership for ratification, as is required by the IBT Constitution. The Union replied it was not possible to have a ratification vote before contract expiration, and renewed its demand for retroactivity and its strike threat.

Subsequently, Petitioners concluded it would be foolish to agree to unlimited retroactivity because it would be an incentive to the Union to stall negotiations into Petitioners' busy season when a strike threat would be most effective. Petitioners conveyed their final economic offer as promised by letter of March 28. Petitioners also made a separate counterproposal to the Union's retroactivity demand. Petitioners proposed agreement on only seven days of retroactivity to allow time for a mail ballot ratification. Petitioners viewed the mail ballot as an effective means to ensure the required ratification vote would occur in a timely fashion.

The Union rejected both the Petitioners' final economic offer, and the mail ballot and retroactivity counterproposal. By letter of March 31, Petitioners informed the Union they would institute a lockout unless the Petitioners' final offer were submitted immediately to the membership through the mail ballot procedure. The Union declined to do so, and the lockout began on April 1.

By letter of April 2, Petitioners clarified their letter of March 31. The April 2 letter stated *inter alia*:

> It appears that you feel that the employers temporarily terminated their operations because Local 639 would not agree to a secret ballot, FMCS supervised, referendum as ratification procedure (sic) for the final employer offer. It is the employers' position that you are free to use whatever means you deem appropriate to ratify the employers' final offer. This is a matter solely up to the Union in handling internal affairs.
>
> * * *
>
> The temporary termination of operations continues only because there is no labor contract. We remain available to meet with representatives of the Local in order to resolve this matter.

Petitioners never commented on the Union's ratification procedures thereafter.

When this letter was sent, the Union had already scheduled a meeting to be held at the Union hall for employee consideration of Petitioners' final offer. The employees rejected the offer on April 2. On the same day, Petitioners and the Union resumed bargaining but both sides maintained their previously declared positions regarding the content of the contract.

Thereafter, the parties had five bargaining sessions under the auspices of the Federal Mediation and Con-

ciliation Service. On April 21, the employees again met in the Union hall and rejected another offer by Petitioners. On April 24, a tentative agreement was reached between the Union and Petitioners. That agreement was ratified by the employees at a Union hall meeting on April 28. The lockout ended immediately thereafter.

On May 7, the National Labor Relations Board (the "Board") issued a complaint alleging that Petitioners violated Section 8(a)(1), (3), and (5) of the Labor-Management Relations Act (the "Act") by (a) threatening to lockout the employees unless the Union agreed to submit Petitioners' final contract offer to the employees by the mail ballot procedure proposed by Petitioners; (b) locking out the employees on April 1, because the Union refused to agree to the mail ballot and (c) continuing the lockout until April 28, because the Union failed to agree to the mail ballot ratification proposal. (ALJ 41a).[2]

Petitioners defended all aspects of the complaint before the Administrative Law Judge (the "ALJ"). The General Counsel only introduced evidence regarding the alleged initial link between the lockout and the ratification proposal. He introduced no evidence regarding the ratification proposal's alleged impact on bargaining. Further he sought to exclude Petitioners' evidence indicating that bargaining from April 2 through April 28 was unaffected by the initial ratification proposal.

The ALJ concluded elements (a) and (b) of the complaint were proved by General Counsel because on

[2] References to the decisions below will be as follows: (ALJ), the interim order of the Administrative Law Judge; (Bd.), the order of the Board; and (Ct. App.), the decision of the Court of Appeals enforcing the Board's order.

April 1 and 2 the lockout was partially in support of the mail ballot ratification proposal. However, he concluded the ratification proposal was effectively withdrawn by Petitioners on April 2 and that the only unfair labor practice alleged ended on that date. Consequently, he imposed a backpay remedy on Petitioners for April 1 and 2. (ALJ 41a-52a).

The Board affirmed the ALJ's conclusions regarding elements (a) and (b) of the complaint. The Board also did not dispute the ALJ's conclusion that the sole motivation for the lockout after April 2 was lawful. (Bd. 20a). However, the Board reversed the ALJ's conclusion that backpay liability terminated on April 2 because:

> In our view, a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole. (Bd. 14a).

Therefore, the Board ordered backpay for the entire duration of the lockout, April 1 through April 28.

The Court of Appeals enforced the Board's order, finding "it dispositive of the issue that the employers here failed to dissipate the effects of their unlawful lockout" because "[t]here was no offer of reinstatement to the employees until the lockout ended on April 28." (Ct. App. 8a).

REASONS FOR GRANTING THE WRIT

I. THE BACKPAY AWARD IS BASED SOLELY ON THE CONCLUSIVE PRESUMPTION THAT AN INITIALLY UNLAWFULLY MOTIVATED LOCKOUT REMAINS UNLAWFUL. DESPITE THE TERMINATION OF THE UNFAIR LABOR PRACTICE. THE ORDER IS PUNITIVE BECAUSE IT IS NOT BASED ON ACTUAL EVIDENCE OF THE UNFAIR LABOR PRACTICE'S IMPACT ON BARGAINING.

At the hearing, Petitioners introduced evidence that the mail ballot ratification proposal was unequivocally withdrawn on April 2, 1975; that even before Petitioners withdrew the mail ballot ratification proposal, the Union had ignored the proposal and scheduled a ratification meeting in the Union hall; that good faith bargaining occurred unimpeded from April 2 through agreement on a contract on April 28; and that after April 2 Petitioners made no reference to the means of ratification. At the hearing, the Union agreed there was no post-April 2 reference to the means of ratification, and the General Counsel stipulated that both parties bargaining in good faith after April 2. (ALJ 40a, 49a).

The General Counsel introduced no evidence that the short-lived ratification proposal had any impact on subsequent bargaining. The parties failed to reach agreement until April 28 only because at the beginning of the lockout they were far apart on the contract duration and its economic terms. (ALJ 40a, 41a, 49a-51a).

The ALJ found that there was a violation of Section 8(a)(1), (3), and (5) of the Act because the ratification proposal was in the Petitioners' final offer at the beginning of the lockout. However, based on all of the evidence presented, he further found the ratification proposal was unequivocally and effectively withdrawn on April 2. He concluded that after April 2 the lockout

was in effect for lawful reasons. Therefore, the ALJ found the sole basis of the unfair labor practice was vitiated. Backpay was imposed for April 1 and April 2. Petitioners do not challenge these conclusions here.

The Board affirmed the ALJ's conclusions regarding the initial unfair labor practice. The Board did not dispute the ALJ's finding that the sole motivation for the lockout after April 2 was lawful. (Bd. 20a). But the Board overturned the ALJ's conclusion that backpay liability terminated on April 2 because:

> In our view, a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole. (Bd. 14a).

The Board ordered backpay for the entire duration of the lockout, April 1 through April 28, because "without a cessation of the lockout and a restoration of the *status quo ante*, it is difficult to conclude that any bargaining which ensued was not adversely affected. . . ." (Bd. 16a).

The Court of Appeals enforced the Board's order, finding "it dispositive of the issue that the employers here failed to dissipate the effects of their unlawful lockout" because "[t]here was no offer of reinstatement to the employees until the lockout ended on April 28." (Ct. App. 8a). But, like the Board, the Court cited absolutely no evidence of bargaining impact.

Thus, the sole basis for the post-April 2 backpay liability is the *conclusive presumption* that an unfair labor practice, existing only at the beginning of a lockout, has a continuing impact on bargaining throughout the lockout's duration, regardless of intervening circumstances. It cannot be overemphasized that neither

the Board nor the Court of Appeals found any record evidence of actual impact on post-April 2 negotiations, nor did they discredit Petitioners' extensive evidence that bargaining was unimpeded. The complete absence of record evidence supporting the post-April 2 remedy is dramatized by General Counsel's attempt at the hearing to bar any evidence of post-April 2 bargaining. After several earlier attempts to exclude Petitioners' evidence of unimpeded bargaining after April 2, Counsel for General Counsel (Mr. Silverman) and the Administrative Law Judge had the following exchange.

> MR. SILVERMAN: Object. There comes a time when relevancy must——
>
> JUDGE LEFF: That's your standard objection, isn't it? You don't want to consider anything. You would just like to rest on the letter of March 31 and stop right there.
>
> MR. SILVERMAN: That's the first position.
>
> JUDGE LEFF: That might make your case a very strong one, but it wouldn't give the respondent a chance to put in his defense. (Tr. 248-249).

Although Petitioners were permitted by the ALJ to introduce evidence of post-April 2 good faith bargaining, it is obvious the Board and Court of Appeals declined to consider the evidence, merely because the lockout continued. The rule first announced and used by the Board in this case was that "a lockout unlawful at its inception retains its initial taint of illegality until it is terminated. . . ." (Bd. 14a). This is the sole basis for the massive backpay liability imposed on Petitioners for the period April 3 through 28.

The impact of this rule extends well beyond this case, for administrative law judges are required to

follow the Board's decisions unless reversed by the courts. In the future, administrative law judges will reject any evidence indicating an initially unlawful lockout was converted to a lawful lockout, unless the lockout itself was ended. Mr. Silverman's objection quoted above will be sustained and respondents will be precluded from proving a continuing remedy would not effectuate the purposes of the Act.

The impact of an unfair labor practice occurring during a lockout is necessarily an evidentiary inquiry; one cannot say as a matter of law that an unfair labor practice occurring with a lockout always "taints" the entire lockout. This proposition has been recognized by the Board and Courts of Appeal.[3] But through its conclusive presumption the Board obviously viewed evidence of mid-lockout, unimpeded bargaining as irrelevant here, despite the fact that the unfair labor practice itself had ended. This is an abrogation of agency

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[3] In *Delhi-Taylor Refining Division*, 167 NLRB 115 (1967), *enf'd sub nom., Hess Oil and Chemical Corp.* v. *N.L.R.B.*, 415 F.2d 440 (5th Cir. 1969), *cert. denied*, 397 U.S. 916, the employer insisted on the exclusion of certain employees from the bargaining unit and simultaneously locked out its employees. The Board found a Section 8(a)(5) violation because of the employer's insistence on excluding certain employees but found that from all the facts and circumstances of bargaining it was apparent the employer's unlawful demand had no real impact on negotiations. Consequently, it found the entire lockout lawful. *Id.* at 117. Similarly, in *Union Carbide Corporation*, 165 NLRB 254 (1967), *enf'd sub nom., Oil, Chemical and Atomic Workers* v. *N.L.R.B.*, 405 F.2d 1111 (D.C. Cir. 1968), *cert. denied* 393 U.S. 914, the employer locked out its employees while a nonmandatory bargaining topic was on the table. The Board reversed the Trial Examiner's finding that violations of §§ 8(a)(5), (3) and (1) of the Act occurred as a result. The Board found, *inter alia*, there was no evidence that the inclusion of the nonmandatory bargaining demands in the final offer was a factor in causing the bargaining impasse. *Id.* at 255.

fact finding responsibility which this Court has consistently rejected.

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act [fn. omitted] will not permit us to accept such adjudicatory practice. See *Jacob Siegel Co.* v. *Federal Trade Com.*, 327 U.S. 608, 613, 614, 90 L ed 888, 893, 66 S Ct 758. Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion." [Citation omitted]. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167 (1962).[4]

The Board has previously conclusively presumed initial and continuing impact of an unfair labor practice, and improperly based its remedy on the conclusive presumption. The Supreme Court put a stop to the practice in *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO* v. *N.L.R.B.*, 365 U.S. 651 (1961). There the Board found that petitioners violated the Act by maintaining and enforcing an agreement which established closed-shop preferential hiring conditions. It ordered "that dues, non-membership dues, assessments, and work permits fees, . . . collected under the illegal contract as the price employees paid in order to obtain or retain their job . . ." be refunded to the employees. The Board justified the order by

[4] The Board's obligation to support its conclusions with proof is the same as is imposed by the Administrative Procedure Act. *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 487 (1951).

stating it was necessary "to expunge the coercive effect" of petitioners' unfair labor practices. The order was enforced by the Court of Appeals. 365 U.S. 652, 653.

The Court observed there was no record evidence that the union membership, fees, or dues were coerced. 365 U.S. at 653. The Board and the Court of Appeals simply inferred the initial and continued coercion "as there was present an implicit threat of loss of jobs if those fees were not paid." The use of this remedy followed the Board's previous practice of creating an "irrebuttable presumption of coercion in cases of illegal closed shop or discriminatory hiring practices." 365 U.S. at 657 (concurring opinion). The practice is directly analogous to the Board's improper action in this case.

The Court reversed the Court of Appeals because

> Where no membership in the Union was shown to be influenced or compelled by reason of any unfair practice, no "consequences of violation" are removed by the order compelling the union to return all dues and fees collected from the members; and no "dissipation" of the effects of the prohibited action is achieved. *NLRB* v. *District 50, U.M.W., supra* (355 U.S. 453). The order in those circumstances becomes punitive and beyond the power of the Board. 365 U.S. at 655.

In *N.L.R.B.* v. *District 50, U.M.W.*, 355 U.S. 453 (1958), relied upon by the Court in *Local 60,* the Court also reversed the Board's attempt to apply a rigid remedial rule without looking into the particular facts and circumstances of the case. The Court noted the Board's power is not limitless:

> The Board may not apply "a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB* v. *Seven-Up Bottling Company*, 344 U.S. 344, 349, 97 L ed 377, 383, 73 S. Ct. 287. 355 U.S. at 458.

Other decisions of this Court establish the Board's fundamental error in applying a conclusive presumption or *per se* rule of liability not mandated by the Act itself. In *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America* v. *N.L.R.B.*, 365 U.S. 667 (1961), the Court disapproved the Board's practice of finding all hiring hall arrangements unlawful unless the arrangement on its face contained the specific conditions outlined by the Board in a previous case. The Court found the mechanical standard applied by the Board objectionable because the standard was applied regardless of whether any evidence of actual illegality existed on the record. *Accord N.L.R.B.* v. *Babcock and Wilcox Company*, 351 U.S. 105 (1956); *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395 (1952).

Petitioners recognize the Board may make inferences regarding motivation and impact on bargaining from the actions of any respondent based on the Board's presumptive expertise in the field. *See Radio Officers' Union, C.T.U.* v. *N.L.R.B.*, 347 U.S. 17 (1954). And, the Board has the ability to find that particular actions establish in themselves a *prima facie* unfair labor practice. *See N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) and *NLRB* v. *Katz*,

et al., 369 U.S. 736 (1962).[8] But these cases have no application here, for under such cases the employer is given the opportunity to rebut the inference or *prima facie* case.

The Board may not ignore all record evidence of post-April 2 good faith, unimpeded bargaining and impose massive post-April 2 liability based solely on a conclusive evidentiary presumption. Where there is no evidentiary linkage between the unfair labor practice and alleged post-April 2 impact, the "order in those circumstances becomes punitive and beyond the powers of the Board." *Local 60, supra*, at 655. As Chairman Murphy said in dissent, "there is no precedent for the majority's holding in this case. . . ." (Bd. 22a).

II. THE CONCLUSIVE PRESUMPTION OF CONTINUED ILLEGALITY IS APPLIED ONLY TO EMPLOYERS' ECONOMIC BARGAINING WEAPON AND IS CONTRARY TO THE PRESUMPTIVE LEGALITY OF LOCKOUTS ESTABLISHED BY THE COURT.

The Board's announced conclusive presumption will necessarily severely intrude upon employers' future, practical ability to use a lawful lockout. In effect, the Board's ruling impels it into the role of "arbiter of

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[8] Contrary to widespread belief, neither of these cases establishes a class of actions in which it may be conclusively presumed an unfair labor practice has occurred or has a continuing impact. Even in *Great Dane's* classification of conduct "inherently destructive" of important employee rights, the employer may rebut the *prima facie* case by showing its action "was motivated by legitimate objectives" 388 U.S. at 34. And in *Katz*, often erroneously cited as [illegible] principle of "*per se* violations", the Court specifically foreclose the possibility that there might be circumstances where the Board could or should accept as excusing or justifying unilateral action . . . ." 369 U.S. at 748. *N.L.R.B.* v. *Cone Mills Corporation*, 373 F.2d 595, 599 (4th Cir. 1967).

the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands" contrary to this Court's injunction in *N.L.R.B.* v. *Insurance Agents International*, 361 U.S. 477, 497 (1960) and *American Shipbuilding Company* v. *N.L.R.B.*, 380 U.S. 300, 317, 318 (1965). Both Chairman Murphy and the Administrative Law Judge recognized that conclusively presuming that a lockout remains unlawful, regardless of intervening events, is inconsistent with the presumptive legality of lockouts announced in *American Shipbuilding*. (Bd. 20a; ALJ 49a).

Prior to the Board's ruling in this case, an employer was properly free to begin a lockout under the presumption of legality announced in *American Shipbuilding*. If the Union charged an unfair labor practice in connection with the lockout, the employer had the option of continuing the lockout if it believed the Union's charges had little substance. The employer ran the risk of being unable to prove the lockout was wholly lawful or that the conduct on which the charge was based did not sufficiently disrupt bargaining to warrant finding the lockout unlawful through its duration. But a fair weighing of all the evidence was all the employer had reason to expect.

Now, a union unfair labor practice charge filed at the inception of a lockout will necessarily have an impact on the viability of the lockout totally out of proportion to the seriousness of the unfair labor practice charged. For, despite the employer's ability to prove facts indicating the alleged unlawful conduct had no impact on bargaining, the employer will be held liable for backpay regardless of how long the lockout continues and regardless of changed circumstances during

the lockout. The rigid rule announced in this case is that "a lockout unlawful at its inception retains its initial taint of illegality until it is terminated." (Bd. 14a).

Like strikes, lockouts can properly continue for months or years while the dynamic process of collective bargaining continues. Bargaining positions of both parties are often transformed in the interim. Ignoring the often vast changes in circumstances during a lockout flies in the face of reason and wars against the duty of reasoned, expert judgment Congress imposed on the Board.

The error in the Board's position is apparent from the facts of this case. Petitioners did all employers could, short of ending the lockout, to prove the short-lived ratification proposal had no impact. It is undisputed that

1) the ratification proposal was withdrawn verbally and in writing on April 2;

2) the sole purposes of the lockout were lawful thereafter;

3) the parties began bargaining again on April 2 and subsequently bargained in good faith until a contract was reached;

4) a contract was not reached immediately because the parties were far apart on the contract duration and economics;

5) the ratification proposal was never mentioned after April 2; and,

6) the Union used the ratification method it preferred on April 2, even before the ratification proposal was withdrawn, and consistently used its preferred ratification method thereafter until the em-

ployees ratified a contract on April 28. (Bd. 20a; ALJ 40a, 41a, 49a, 50a).

Where is the alleged impact of the ratification proposal, and what else could have been shown to prove an absence of impact? Nothing could have satisfied the Board but stopping a lockout which was admittedly based on lawful motivations after April 2. (Bd. 14a, 20a; ALJ 49a).

Through its conclusive presumption, the Board has thrown its weight against the economic weapon of employers. But the Board has forcefully rejected the use of similar conclusive presumptions of illegality when unions are on the offensive. In *Local 344, Retail Clerks International Association,* 136 NLRB 1270 (1962), the union picketed an employer for what the Board found to be an unlawful purpose. The picketing continued without a hiatus but the union announced a different purpose by altering the legend on its picket signs. *Id.* at fn. 5. The Board observed the record was devoid of any evidence the union continued its initial unlawful purpose, and it recognized the dynamics of labor relations are ill-suited to conclusive evidentiary presumptions:

> General Counsel, however, takes issue with the Trial Examiner and argues, in substance, that because the picketing prior to November 13, 1959, was for an [unlawful purpose], it must be conclusively presumed that the picketing was for these proscribed objects thereafter. Like the Trial Examiner, we reject this presumption. . . .
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> • • •
>
> Contrary to our dissenting colleagues, we reject the application of a presumption of the continuity of a state of affairs in construing the legality of

> picketing where there is no substantial independent evidence to support such a presumption. 136 NLRB at 1273.

Only three months before its decision in the instant case, the Board reaffirmed this position.

> In situations were unions have been found to have picketed for an illegal objective and then have sought to picket for another objective, the Board has long rejected the application of a presumption of the continuity of the illegal objective where there is no substantial independent evidence to support such a presumption. The new picketing should be determined to be good or bad for what it is and not by reason of the object or purpose of earlier picketing. The concept of a 'hiatus' is a tool in determining the objective of a union, and not a rule." [Citing *Local 344, supra.*] *Building and Construction Trades Council of Philadelphia,* 222 NLRB 1276, 1280 (1976).

Thus, when a union pickets, a break in initially unlawful picketing is only one factor in determining the legality of continued picketing. A break in a lockout, though, is now the sole determinant of legality. The Board's unreasoned antipathy to lockouts is apparent from this disparate treatment. The Board's more stringent rule for employers intrudes all the more on the sort of lawful economic weapons employers may use when, as here, the rule imposes massive liability regardless of record evidence. This unreasonable practice goes to the heart of the Court's concern in *N.L.R.B.* v. *Insurance Agents International, supra.*

III. THE IRREBUTTABLE PRESUMPTION OF CONTINUED IMPACT ON NEGOTIATIONS DENIED PETITIONERS THEIR DUE PROCESS RIGHT TO PRESENT EVIDENCE ON THE ISSUE CRITICAL TO LIABILITY.

The only basis for post-April 2 backpay was the alleged lingering effect of the initial coupling of the lockout with the ratification proposal.[6] General Counsel introduced no evidence of post-April 2 negotiations. Despite General Counsel's objections, Petitioners introduced evidence that bargaining after April 2 was unimpeded by the ratification proposal. The Administrative Law Judge so found on the facts before him and cut off Petitioners' liability on April 2. But the Board stated:

> In our view, a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole.

Thus, the Board rejected *all* evidence regarding post-April 2 negotiations, but found post-April 2 impact on bargaining, the issue critical to the Board's imposition of damages on Petitioners. This is as effective a denial of a fair hearing as would be a refusal to permit introduction of the rebuttal evidence. In the future General Counsel's objection to post-lockout rebuttal evidence will be sustained because the Board has conclusively presumed it is irrelevant so long as the lockout continues.[7]

This Court has ruled that even a legislative body denies due process by using an irrebuttable presumption contrary to fact to deny a party the opportunity to present evidence on issues critical to an administrative determination. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Turner* v. *Department of Employment Security of Utah*, 423 U.S. 44 (1975); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Bell* v. *Burson*, 402 U.S. 535 (1971); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Heiner* v. *Donnan*, 185 U.S. 312 (1932); *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926).

In *Vlandis*, plaintiffs challenged the validity of a Connecticut statute which charged all State University students who were not residents at the time of their application for admission the nonresident tuition rate for their entire tenure at the university. The State said the intention of the statute was to ensure only bona fide Connecticut residents would receive the State's subsidization of higher education.

Plaintiffs did not challenge the State's right to make such a classification. Plaintiffs merely claimed the due process right to rebut the initial determination of residency made at the time of their application for admission to the university. The Court held:

> In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due

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[6] See discussion at pages 8-10, *supra*.

[7] See pages 10, 11, *supra*.

> process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rate. 412 U.S. at 452.

Similarly, Petitioners do not contest the Board's ability to impose backpay for whatever period negotiations were actually impeded by the unfair labor practice. Nor do Petitioners dispute that the burden of proving the dissipation of the unfair labor practice may properly rest on them. But the absolute denial of a right to effectively present evidence showing the initial impact was dissipated during an otherwise lawful lockout is as clear a denial of due process as occurred in *Vlandis*, its progeny, or predecessors. Each of the stringent rules in *Vlandis* is met in this case:

1. The conclusive presumption operates with respect to the issue determining liability—continued impact on bargaining;
2. The conclusive presumption of continued impact on negotiations "is not necessarily or universally true in fact";[9]
3. The Board has a reasonable alternative to the conclusive presumption, simply hearing with an open mind respondent's evidence regarding mid-lockout negotiations.

If a legislative body may not deny the right to rebut evidence determining liability in an administrative proceeding, the agency charged with conducting the hearing certainly may not do so.

The historic objection to statutory conclusive presumptions is that they usurp the judicial fact-finding

[9] See fn. 3, *supra*, which establishes that the Board and Courts of Appeal have previously recognized this fact.

function.[9] In order to maintain the judicial fact-finding function, legislatures are constrained to enact a generally applicable rule but to leave determinations of which individuals fall within its scope to the judiciary.[10] Here, Congress has properly delegated to the Board the responsibility of determining *from all of the facts and circumstances* whether an unfair labor practice exists and the appropriate remedy. But, contrary to due process principles and statutory requirements, the Board has effectively denied Petitioners the right to rebut a factual allegation that determines the remedy. As the Court observed in *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292 (1937),

> Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. [Citation omitted]. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (*St. Joseph Stockyards Company* v. *United States*, 298 U.S. 38, 73, 80 L. ed. 1033, 1052, 56 S. Ct. 720) of a fair and open hearing be maintained in its integrity.
>
> * * *
>
> There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that mini-

[9] Note "Irrebuttable Presumptions As An Alternative To Strict Scrutiny: From Rodriguez to LeFleur", 62 Geo. L. J. 1173, 1197 (1974).

[10] *Id.*

mal requirement has been neglected or ignored. 301 U.S. 304, 305.

The Board has no doubt saved a few hours of hearing time and some difficult decision making by stating its conclusive presumption of continued liability rather than weighing all facts and circumstances. It has simultaneously imposed a huge liability on Petitioners in total disregard of the only record evidence that could determine liability flowing from post-April 2 impact on bargaining. This is clearly the kind of administrative "compromise on the footing of convenience or expediency" which this Court has long condemned, *Ohio Bell Telephone Company, supra,* 301 U.S. at 305.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 761603

MOVERS AND WAREHOUSEMEN'S ASSOCIATION OF METROPOLITAN WASHINGTON, D. C., INC., AND ITS EMPLOYER MEMBERS:

BEKINS MOVING & STORAGE CO.
COLONIAL STORAGE CO.
DISTRICT MOVING & STORAGE INC.
FIDELITY STORAGE CO.
LIONS TRANSFER CO.
MERCHANTS STORAGE CO. OF VA.
MERCHANTS TRANSFER & STORAGE CO.
COLUMBIA VAN LINES CORP.
SECURITY STORAGE CO. OF WASHINGTON
SMITH'S MOVING & STORAGE CO., INC.
UNITED STATES MOVING & STORAGE CO., INC.,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, DRIVERS, CHAUFFEURS AND HELPERS,
Intervenor.

On Petition for Review of an Order of the National Labor Relations Board

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(Argued January 11, 1977 Decided February 23, 1977)

Before WINTER, CRAVEN and BUTZNER, Circuit Judges.

CHARLES P. O'CONNOR (E. CARL UEHLEIN, JR., HARRY W. BURTON, MORGAN, LEWIS & BOCKIUS on brief) for Petitioners; JOHN D. BURGOYNE, Assistant General Counsel, National Labor Relations Board (JOHN S. IRVING, General Counsel, JOHN E. HIGGINS, JR., Deputy General Counsel, CARL L. TAYLOR, Associate General Counsel, ELLIOTT MOORE, Deputy Associate General Counsel, ANDREW F. TRANOVICH, Attorney, National Labor Relations Board on brief) for Respondent; S. G. LIPPMAN (THOMAS J. HART, LIPPMAN & HART on brief) for Intervenor Local Union 639, I.B.T.

CRAVEN, Circuit Judge:

Three questions are presented by the employers' petition or review and the Board's cross-application for enforcement of its order.

I.

Is there substantial evidence to support the Board's finding that the employers [1] locked out their employees for the dual purposes of (1) exerting economic pressure to secure acceptance of the employers' final contract offer and (2) compelling the Union to submit the final offer to its members for ratification by a mail ballot referendum procedure?

We need look only at the letters written by Virgil Seward, Chairman of the MAWA Negotiating Committee, to the President of the Union dated March 27 and March 31, 1975,

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[1] Movers and Warehousemen's Associations of Metropolitan Washington, D. C., Inc., (MAWA) is a multi-employer bargaining association composed of ten unionized moving and storage companies in the Washington area. Although MAWA was not formally organized until 1969, it has been the moving companies' practice for some 20 years to bargain as a group with the Union.

to conclude that there is substantial evidence to support the finding. The first letter advised that the employers would agree to retroactivity of their final offer from the time of compiling the results of membership balloting, April 7, 1975, back to April 1, 1975, if the Union would submit the employers' final offer through a referendum mail ballot pursuant to a provision of the union constitution. In the same paragraph of the letter, the employers interpreted that provision to mean that the offer could be rejected only by a two-thirds vote of the union membership. We need not decide the question, but the Union interpreted the ratification clause of its constitution differently—as requiring only a simple majority vote. In any event, union negotiators had made it perfectly clear during current negotiations that the membership had been disturbed about the 1972-75 contract provision under which the ratification vote had taken place at the "barns" and had insisted all along that voting take place at the union hall. The Union therefore was not receptive to the employers' proposed ratification procedure.

The March 31 letter from Mr. Seward was even more insistent:

> . . . Unless you advise us today that you will submit the employers' final offer to the membership by way of the mail ballot procedure we proposed to you on March 27, 1975, . . . the Association's membership will be forced to terminate operation by bargaining unit personnel on Tuesday, April 1, 1975.

Faithful to their chief negotiator's word, the employers locked the "barns" on April 1, and continued the lockout until April 28, 1975.

When the Union protested the lockout as an unfair labor practice, Seward hand delivered another letter, dated April 2, in which he said that the lockout was not prompted by the Union's failure to accept the mail ballot

ratification demand and that the temporary termination of operations would continue only because there was no labor contract.

What has been recited is sufficient to demonstrate that there is substantial evidence to support the Board's finding that the employers had a dual objective—to bring economic pressure to bear on the Union to accept the employers' final offer with respect to wages, hours and other terms and conditions of employment, *and* to coerce the Union into accepting the employers' proposed procedure for ratification.

II.

In an atmosphere free of antiunion animus, and with a stable bargaining relationship existing for more than 20 years, is it an unfair labor practice for an employer to lock out his employees for the purpose of exerting economic pressure in support of his bargaining position *and* for the purpose of forcing the Union to follow a contract ratification procedure preferred by the employer?

We think so. For guidance we look to *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). In that case, as in this one, there was no bad faith on either side.

> But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. . . . But it does not follow that, because the Company may propose [nonmandatory subjects] . . ., it can lawfully insist upon them as a condition to any agreement.

Id. at 349.

In *Borg-Warner* the employer insisted upon a "ballot" clause which required an opportunity for all employees in the bargaining unit to vote by secret, impartially supervised, written ballot on whether to accept or reject the Company's last offer. The Supreme Court held that such a ballot clause is not a subject within the phrase "wages, hours and other terms and conditions of employment," 29 U.S.C. § 158(d), and was therefore not a subject of mandatory bargaining. The Court said:

> The "ballot" clause is not within that definition. It relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment—it merely calls for an advisory vote of the employees. . . . The "ballot" clause . . . deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the "representative" chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative.

Id. at 349-50.

In *Houchens Market of Elizabethtown, Inc.* v. *NLRB*, 375 F.2d 208, 212 (6th Cir. 1967), the Sixth Circuit said the following about an employer's insisting upon a ratification clause:

> The Company, by insisting after all the other terms of the contract were agreed upon, that the contract be approved or ratified by a majority of the employees, was attempting to bargain, not with respect to "wages, hours and other terms and conditions of employment", but with respect to a matter which was exclusively within the internal domain of the Union. Members of a Union have the right to determine the extent of

> authority delegated to their bargaining unit. It is within their province to determine whether or not their bargaining unit may enter into a binding contract with or without membership ratification. It is not an issue which the Company can insist upon without mutual agreement by the Union, any more than the Union can insist that the contract be submitted to the Board of Directors or stockholders of the Company.

Similarly, in *NLRB* v. *Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956), our Chief Judge Parker had this to say in a case involving a ratification clause:

> It is well settled that an employer may not insist upon including as a condition of the contract terms having no relation to the statutory duty to bargain.

Id. at 89. We held in that case that an employer who insists as a condition of entering into any bargaining agreement upon a provision requiring ratification of the contract by secret vote of the employees is guilty of an unfair labor practice amounting to a refusal to bargain in violation of sections 8(a)(1), 8(a)(3) and 8(a)(5), 29 U.S.C. § 158(a)(1), (3), (5).

The only difference between *Borg-Warner*, *Houchens*, and *Darlington* and the present case is that the employers in those cases did not go so far in insisting upon union acceptance of a nonmandatory item. If an employer may not lawfully refuse to sign a contract unless it contains a "ballot" clause, and that is clear, certainly he may not so insist to the point of lockout—the ultimate weapon in the labor relations arsenal.

The only other question is whether the employers' desire to bring economic pressure to bear in support of their legitimate bargaining posture is sufficiently important to insulate their unlawful purpose of controlling the Union's preferred method of ratification. In other areas of labor

law it is well established that an unlawful purpose is operative to invoke the sanctions of the Act even though accompanied by legitimate purposes. *E.g.*, *Neptune Water Meter Co.* v. *NLRB*, No. 76-1097 (4th Cir., Feb. 1, 1977). We think that to be equally true here. Thus we hold that even if a lockout is motivated in part by the wish to exert economic pressure for the lawful purpose of supporting a legitimate bargaining position, the lockout is nevertheless unlawful if also motivated by an intent to interfere with, and thus injure, a labor organization in the exercise of its own internal operating procedures. *See American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 308 (1965); *NLRB* v. *Bagel Bakers Council*, 434 F.2d 884, 889 (2d Cir. 1970); *NLRB* v. *Southern Beverage Co.*, 423 F.2d 720 (5th Cir. 1970); *NLRB* v. *David Friedland Painting Co.*, 377 F.2d 983, 989 (3rd Cir. 1967). Here the Board properly drew an inference that the employers were determined to injure the Union by weakening the ratification power of its members. Thus we hold that the Board properly concluded that the employers here violated sections 8(a)(1), (3) and (5) of the Act by threatening to lock out, and locking out, their employees because the Union refused to submit the employers' final contract offer to the employees for ratification by way of a mail ballot referendum.

III.

When does an unlawful lockout become lawful—if ever?

On April 2, 1975, Mr. Seward, after consultation with counsel, sent another letter to the union president. This time he backed away from insisting upon a secret mail ballot and conceded that the Union was free to use any means it deemed appropriate to ratify the employers' final offer, concluding "this is a matter solely up to the Union in handling internal affairs." The letter ended with the statement that the lockout "continues only because there is no labor contract."

The administrative law judge thought the April 2 letter cured the illegality of the lockout and stopped the running of an award of backpay as of that day. The Board disagreed, expressing the view that a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole,[2] citing prior Board decisions. We think it dispositive of the issue that the employers here failed to dissipate the effects of their unlawful lockout. There was no offer of reinstatement to the employees until the lockout ended on April 28. The employers never acknowledged their wrongdoing with regard to the lockout and never offered backpay—not even for the first two days of the lockout. Indeed, the employers have always asserted, even on appeal, that the lockout was lawful from the beginning and that the employees were not entitled to backpay. If the employers had offered reinstatement to the unlawfully locked out employees on April 2, it does not necessarily follow that the lockout would have been immediately resumed on April 3. As the Board put it:

> Considering the parties' long history of peaceful labor relations, the smooth negotiations through March 25, the two months remaining until the busy season, and the Union's recognition that MAWA could, after a hiatus, lawfully lockout for economic reasons, it is not unlikely that collective bargainng free of the unfair labor practices could have resulted in an earlier contract.

We agree with the Board that by locking out the employees on April 1, 1975, and by continuing said lockout

[2] We assume the Board does not mean the illegality and entitlement to backpay would run until the employees actually received their backpay checks. An admission of illegality and an offer to make whole would presumably be effective as of the time made, but we need not decide, for that question is not presented on this record.

until April 28, 1975, the employers engaged in unfair labor practices within the meaning of sections 8(a)(1), (3) and (5) of the Act. We hold that the Board's remedy is not inappropriate and that the locked out employees are entitled to be made whole for any loss of pay they may have suffered by reason of such unlawful conduct.

ORDER ENFORCED.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOVERS AND WAREHOUSEMEN'S ASSOCIATION OF METROPOLITAN WASHINGTON, D.C., INC. AND ITS EMPLOYER MEMBERS, JOINTLY AND SEVERALLY:

BEKINS MOVING & STORAGE CO.
COLONIAL STORAGE CO.
DISTRICT MOVING & STORAGE INC.
FIDELTY STORAGE CO.
LIONS TRANSFER CO.
MERCHANTS STORAGE CO. OF VA.
MERCHANTS TRANSFER & STORAGE CO.
COLUMBIA VAN LINES CORP.
SECURITY STORAGE CO. OF WASHINGTON
SMITH'S MOVING & STORAGE CO., INC.
UNITED STATES MOVING & STORAGE CO., INC.[1]

and

LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CASE 5—CA—7232

Decision and Order

On September 15, 1975,[2] Administrative Law Judge Arthur Leff issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party (herein also called the Union) filed exceptions and supporting briefs, Respondent filed cross-exceptions and a brief in support thereof, and Charging Party filed a reply brief to Respondent's cross-exceptions.

[1] Herein collectively referred to as Respondent or MAWA. As noted by the Administrative Law Judge in fn. 2 of his Decision, MAWA did not represent Merchants Transfer & Storage Co. in the negotiations for the 1975 collective-bargaining agreement. Furthermore, the statement made at the hearing by Respondent's counsel that the inclusion of that company in the complaint was erroneous was undisputed. Accordingly, in the absence of any allegation or evidence as to the individual conduct or responsibility of the said company, and since no exception has been filed to the Administrative Law Judge's omission of Merchants Transfer & Storage Co. from his recommended Order, we make no findings concerning it and it is not subject to the remedial Order herein.

[2] All dates herein are in 1975 unless otherwise indicated.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order, except as modified herein.

The pertinent facts are fully set forth by the Administrative Law Judge.

Briefly, for more than 20 years the members of MAWA and the Union have enjoyed a stable bargaining relationship. The collective-bargaining agreement in effect just prior to the events herein was due to expire March 31. Consequently, on March 10 the parties held their first meeting to negotiate a new agreement. At that meeting, one of the Union's negotiators, Roland Warren, told the MAWA representatives that, because of the employees' dissatisfaction with the procedure used in ratifying the then current contract, that procedure would not be used to ratify the contract being negotiated. At the fourth bargaining session, on March 25, Respondent made a "final" offer. Union President DeBrouse agreed that, pursuant to a provision of the Union's constitution, he would submit the offer to the membership but would not recommend its acceptance.

[3] The Administrative Law Judge states in his Decision that "the General Counsel stipulated that [Respondent and Charging Party] bargained in good faith" during their contract negotiations in April. While the record fails to establish such a stipulation, it does show that General Counsel offered to "stipulate that both parties were attempting to negotiate an agreement . . . during the month of April," but the Charging Party declined to join therein.

On March 27, MAWA sents its "final" offer in writing to the Union, along with a letter stating that the offer would be retroactive if the Union agreed to employee ratification by a mail ballot referendum as set forth in the letter. DeBrouse subsequently telephoned MAWA's chief negotiator, Virgil Seward, and rejected the proposed ratification procedure. Thereafter, on March 31, Seward wrote to DeBrouse stating that, unless the Union notified MAWA that day that it would submit Respondent's offer to the employees according to the procedure specified in the March 27 letter, "the Association's membership will be forced to terminate operations by bargaining unit personnel on Tuesday, April 1, 1975."

In a telephone conversation that same day, DeBrouse told Seward that the Union would consider the threatened lockout an unfair labor practice. Also on March 31, DeBrouse sent a telegram to MAWA's attorney in which he stated that "if the Moving and Storage Association locks out its employees it is in violation of their agreement and the contract will not be settled until each employee is paid for all lost earnings."

On April 1, all bargaining unit employees were laid off. That same day, in response to the above-quoted telegram, Seward hand delivered a letter to DeBrouse, in which Seward expressed MAWA's position that it was not in violation of its collective-bargaining agreement or the NLRA and that "none of the employees involved . . . are entitled to backpay."

It appears that by the following day, April 2, MAWA had become concerned that the lockout might constitute an unfair labor practice. Consequently, on that date, after consultation with counsel, Seward sent another letter to DeBrouse, stating in part:

> In response to your telephone call of yesterday, it is important to reiterate the reason why the employers

> found it necessary to terminate their operations on April 1, 1975. It appears that you feel that the employers temporarily terminated their operations because Local 639 would not agree to a secret ballot, FMCS supervised, referendum as ratification procedure for the final employer offer. It is the employers' position that you are free to use whatever means you deem appropriate to ratify the employers' final offer. This is a matter solely up to the Union in handling internal affairs.

The letter concluded with the statement that the lockout "continues only because there is no labor contract. We remain available to meet with representatives of the Local in order to resolve this matter."

In the meantime, the unit employees voted to reject MAWA's contract offer on April 2, Thereafter the parties held several bargaining sessions including one on April 2 after the employees' rejection of MAWA's proposal. At this meeting DeBrouse asked Seward to end the lockout pending negotiations and Seward replied that "we would not end the lockout until we negotiated." The parties reached a tentative agreement on April 24, which was ratified by the membership on April 28. The lockout ended that same day.

The Administrative Law Judge found that MAWA's threat to lockout its employees on March 31 and its subsequent lockout of the employees on April 1 had a dual objective—to bring economic pressure to bear on the Union in support of MAWA's bargaining position and to coerce the Union into adopting MAWA's proposed procedure for ratification by unit employees of the contract being negotiated. The Administrative Law Judge further found that the ratification procedure was a nonmandatory subject of bargaining and that Respondent could not lawfully lock out its employees in support of its demands on such a subject.

He therefore concluded that the threat to lock out violated Section 8(a)(1) and (5) of the Act and that the lockout itself violated Section 8(a)(1), (3), and (5) of the Act. We agree with these findings.

The Administrative Law Judge further found that MAWA retracted its nonmandatory demand regarding the contract ratification procedure and thus cured the lockout of its initial illegality. Accordingly, he concluded that the remainder of the lockout was solely in support of MAWA's economic bargaining position and was therefore lawful. We disagree with the conclusion that the lockout was converted to lawful conduct.

In our view, a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole. In this regard, contrary to the Administrative Law Judge, we find analogous such cases as *Retail Clerks International Association, Local No. 1179. AFL (California Association of Employers)*, 109 NLRB 754 (1954), and *Lawrence Typographical Union No. 570, affiliated with the International Typographical Union, AFL-CIO (Kansas Color Press, Inc.)*, 158 NLRB 1332 (1966).

In *Retail Clerks Local 1179*, the Board held that a strike which was unlawful at its commencement because the union failed to give notice to the Federal Mediation and Conciliation Service as required by Section 8(d) of the Act was not rendered lawful by the subsequent giving of such notice. In so holding, the Board emphasized that "To permit the Union to continue unhampered the very strike which constitutes the heart of its unlawful conduct would be to countenance its continued flaunting of an explicit proscription of the statute."[4] Likewise, in *Lawrence Typographical Union No. 570*, the Board adopted without comment the Trial Examiner's finding that a strike which

[4] 109 NLRB at 759.

initially violated Section 8(b)(7)(B) of the Act because it commenced within 12 months of a valid election continued to be unlawful after the expiration of the 12-month period. Although there was no discussion of how the strike could be cured of its illegality, implicit in the Board's decision is the conclusion that action which violates the Act as its commencement continues to be unlawful for its entire duration.

We cannot agree with our dissenting colleague that these cases are inapposite to the instant situation because they involved strikes which failed to meet statutory conditions precedent for a lawful strike. In our view, it is wholly immaterial to a determination of the continuing impact of illegal activity whether the activity was initially unlawful because it violated an affirmative requirement of the statute or because its motivation was unlawful. This view is supported by the Board's decision in *The Arundel Corporation*, 210 NLRB 525 (1974). In that case the Board found that the union's strike commenced in violation of the parties' no-strike agreement and did not become a lawful economic strike after the no-strike provision formally expired because the union had not corrected its unprotected action by terminating the strike. The Board further held that the unprotected strike constituted a valid affirmative defense to the union's charge that the company unlawfully refused to bargain. The General Counsel had argued that it would be futile to require the union to abandon the strike on the expiration date because the strike could immediately be resumed as a protected economic strike. The Board found no merit to this position, holding that it would be wholly unwarranted and speculative to assume that, had the strike terminated and bargaining resumed, the parties would not have reached agreement, which would obviate the need for the strike. We conclude that similar considerations apply in the instant case.

The record shows that MAWA failed to dissipate the effects of its unlawful lockout and to restore its employees to the *status quo ante*. Thus, MAWA failed to offer reinstatement to the locked-out employees until April 28, never offered backpay for the first 2 days of the lockout, and never acknowledged its own wrongdoing to the employees with regard to the lockout. To the contrary, by the letter of April 1 referred to above, MAWA stated its position that the lockout violated neither the parties' collective-bargaining agreement nor the Act and that the locked-out employees were not entitled to backpay. In addition to MAWA's failure to affirmatively remedy the illegal lockout, record evidence shows that the injection into bargaining of the lockout issues may well have had some effect on negotiating a new contract. MAWA acknowledged in the April 1 letter that the Union had taken the position that a lockout would violate the collective-bargaining agreement and that a new contract would not be negotiated until the locked-out employees were paid their lost earnings. The Union negotiators called a union membership meeting at the advent of the unlawful lockout to discuss, *inter alia*, the charge the Union was filing. Finally, the union president, in the March 31 telegram quoted above, demanded at the lockout's outset that MAWA end the lockout and reinstate the employees in order for the negotiations to continue.

In these circumstances, without a cessation of the lockout and a restoration of the *status quo ante*, it is difficult to conclude that any bargaining which ensued was not adversely affected, since the Union was required to negotiate with MAWA and to ratify the contract from a weakened position induced by the unlawful lockout and the injection of the lockout-related issues into the bargaining process. To deny that these issues complicated negotiations, which were found by the Administrative Law Judge to have gone smoothly until March 25, would be to ignore collective-bargaining realities. Similarly, to presume that, if MAWA

had offered reinstatement to the unlawfully locked-out employees on April 2, the lockout would have immediately been resumed on April 3 is speculative. Considering the parties' long history of peaceful labor relations, the smooth negotiations through March 25, the 2 months remaining until the busy season, and the Union's recognition that MAWA could, after a hiatus, lawfully lockout for economic reasons, it is not unlikely that collectively bargaining free of the unfair labor practice could have resulted in an earlier contract. In any event, the burden must be on Respondent to show that its failure to restore the *status quo ante* had no adverse impact on the subsequent collective bargaining. For "it rest[s] upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it is immune." *N.L.R.B.* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (C.A. 2, 1938), cert. denied 304 U.S. 576. Here no such showing has been made.

Accordingly, based on all the foregoing, we conclude that the Administrative Law Judge erroneously found that Respondent's withdrawal of its nonmandatory demand cured the lockout of its initial illegality. To the contrary we conclude that the lockout violated Section 8(a)(1),(3), and (5) of the Act for its entire duration.

Amended Conclusion of Law

Substitute the following for the Administrative Law Judge's Conclusion of Law 4:

"4. By locking out the employees in the appropriate unit on April 1, 1975, because, *inter alia*, the Union failed and refused to submit Respondent's final contract offer for ratification by the unit employees in the manner that Respondent had specified and by continuing said lockout until April 28, 1975, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act."

Amended Remedy

Having found that Respondent unlawfully continued the April 1, 1975, lockout until April 28, 1975, we shall, in addition to the remedy recommended by the Administrative Law Judge further order that Respondent make such employees whole for any loss of pay they may have suffered by reason of such unlawful conduct, by payment to each of them of a sum of money equal to that which he or she would have normally earned as wages from April 1, 1975, to April 28, 1975, less his or her net earning during said period, such sums to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Additionally, because Respondent's violations of Section 8(a)(3) go to the very heart of the Act, we shall issue a broad order requiring Respondent to cease and desist from in any other manner infringing upon the rights guaranteed to its employees by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4, 1941).

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Movers and Warehousemen's Association of Metropolitan Washington, D.C., Inc. and its Employer Members, Jointly and Severally: Bekins Moving & Storage Co., Colonial Storage Co., District Moving & Storage Inc., Fidelity Storage Co., Lions Transfer Co., Merchants Storage Co. of Va., Columbia Van Lines Corp., Security Storage Co. of Washington, Smith's Moving & Storage Co., Inc., and United States Moving & Storage Co., Inc., their respective officers, agents, successors, and as-

signs, shall jointly and severally, take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Make whole all employees in the aforesaid appropriate bargaining unit for any loss of pay they may have suffered from April 1 1975, to April 28, 1975, by reason of Respondent's unfair labor practices herein found, in the manner set forth in the section above entitled 'The Remedy.' "

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. June 3, 1976.

John H. Fanning, Member
Howard Jenkins, Jr., Member
John A. Penello, Member
National Labor Relations Board

(Seal)

Chairman Murphy, concurring in part and dissenting in part:

I agree with my colleagues and with the Administrative Law Judge that Respondent's threat to lock out employees on March 31, 1975, violated Section 8(a)(1) and (5) of the Act and that the subsequent lockout on April 1 violated Section 8(a)(1), 3), and (5) of the Act. Contrary to the majority, however, I would find in agreement with the Administrative Law Judge that Respondent's retraction on April 2 of its nonmandatory bargaining demand cured the lockout of its initial illegality.

The majority does not dispute the Administrative Law Judge's conclusion that:

> [B]argaining lockouts are presumptively privileged even when they occur prior to a bargaining impasse. That presumption may be overcome only if it is shown by all the surrounding circumstances that the lockout was motivated, wholly or in significant part, by a purpose to evade the duty to bargain, to discourage union activity, or to achieve some other objective that is inherently destructive of employee rights.[5]

In this case it is clear that after April 2 the lockout was solely motivated by Respondent's desire to reach a contract prior to the start of the busy season around May 15. Under these circumstances, I agree with the Administrative Law Judge that it would "exalt form over substance" to require Respondent to cease the lockout and return to the *status quo ante*, only to resume the lockout a day, or perhaps even an hour, later.

Contrary to the majority, and in agreement with the Administrative Law Judge, *Retail Clerks Local 1179*, 109 NLRB 754, and *Typographical Union No. 570*, 158 NLRB 1332, are neither analogous to the instant case nor precedent for the majority's holding herein. In both those cases the strikes at their inception failed to meet specific statutory conditions precedent to a lawful strike. In *Retail Clerks, supra*, the union commenced a strike without giving the notice required by Section 8(d) of the Act to the Federal Mediation and Conciliation Service. In *Typographical Union No. 570, supra*, the strike was unlawful because it commenced within 1 year of a valid election. Thus, to the extent that a lockout is the analogue of a strike, these cases would be apposite if the lockout herein violated some affirmative requirement specified in the statute. That is not, however, the situation presented by this

[5] ALJD, III, E. 3, par. 3.

case, for the lockout was initially unlawful because, and only because it was in part unlawfully motivated.

I would make a distinction between continuation of activity unlawful at its inception because it violates an express statutory command, and otherwise lawful activity which constitutes an unfair labor practice solely because one of its dual objectives is unlawful. In the former situation, I see no method by which the taint of illegality may be removed short of ceasing the unlawful conduct. The illegality in the latter situation, however, may be cured, in my view, by a clear showing that the unlawful motivation no longer exists. Such a showing was unquestionably made in this case by the April 2 letter, quoted by the majority, in which Respondent specifically retracted its unlawful objective for the lockout.

Similarly, *The Arundel Corporation*, 210 NLRB 525, upon which the majority also relies, is distinguishable. In that case, the Board majority found that a strike which commenced in violation of a contractual no-strike clause and continued after the provision's stated expiration date constituted a valid defense to a charge that the respondent employer unlawfully refused to bargain. The majority expressly found, however, that the circumstances of that case indicated that the parties contemplated extension of the no-strike clause for a reasonable period after its specified termination date and that

> [t]he exact terminal date of the no-strike extension herein is indeterminable because the Charging Party's unprotected strike in repudiation of its agreement removed Respondent's obligation to resume bargaining over the reopener issues . . . and it will have no obligation to engage in such bargaining . . . until the Charging Party restores the *status quo ante* by terminating its unprotected strike. [Footnote omitted.] [6]

Thus, it appears that the holding in *Arundel Corporation* was predicated at least in part on the majority's conclusion that the union, by its own action in violating the no-strike clause, rendered it impossible to fix a date for the provision's expiration. In the instant case, however, there is no basis for a similar conclusion inasmuch as Respondent plainly and effectively retracted its unlawful demand on a specific date.

Accordingly, as there is no precedent for the majority's holding in this case and since I do not believe that the majority decision effectuates the purposes of the Act, I respectfully dissent from my colleagues' conclusion that the lockout remained unlawful throughout its entire duration.

Dated, Washington, D.C. June 3, 1976.

Betty Southard Murphy, Chairman
NATIONAL LABOR RELATIONS BOARD

Appendix

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in, or threaten to engage in, lockouts, layoffs, or other measures adversely affecting the earnings of the employees in the appropriate bargaining unit described below, where an object thereof is to force or require Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to adopt methods or procedures proposed by us for the ratification of contract offers.

WE WILL NOT discourage membership and activities in Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminating in regard to the hire or tenure of employment, or in any other manner in regard to any term or condition of employment, of employees in the appropriate bargaining unit described below.

WE WILL NOT refuse to bargain collectively in good faith with the aforementioned Union, as the exclusive bargaining representative of all our employees in the appropriate bargaining unit described below, by engaging in, or threatening to engage in, lockouts, layoffs, or other retaliatory measures adversely affecting the earnings of the bargaining unit employees where an object thereof is to force the Union to adopt methods or procedures proposed by us for the ratification of contract offers.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL make whole the employees in the bargaining unit described below for any loss of pay suffered by them from April 1, 1975, to April 28, 1975, by reason of our lockout of the employees, found by the Board to have been unlawful during that period. The bargaining unit is:

> All drivers, helpers, packers, freighters, warehousemen tow-motor operators, foremen and such other employees as may be presently or hereafter represented by the Union but excluding clerical employees, guards and supervisors as defined in the Act, who are engaged in household moving and storage within the jurisdiction of the Union, and who are employed by Employers (including those named below) that are members of, and are represented for the purposes of collective bargaining with the Union by, Movers and

Warehousemen's Association of Metropolitan Washington, D. C., Inc.

Movers and Warehousemen's Association
of Metropolitan Washington, D. C., Inc.

By .....
Bekins Moving & Storage Co. By .....
Colonial Storage Co. By .....
District Moving & Storage, Inc. By .....
Fidelity Storage Co. By .....
Lions Transfer Co. By .....
Merchants Storage Co. of Va. By .....
Columbia Van Lines Corp. By .....
Security Storage Co. of Washington
By.....
Smith's Moving & Storage Co., Inc.
By.....
United States Moving & Storage Co., Inc.
By.....
(Representative) (Title)

Dated .....

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1019 Federal Building, Room 1019, Charles Center, Baltimore, Maryland 21201 Telephone 301—962-2772.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 5-CA-7232

MOVERS AND WAREHOUSEMEN'S ASSOCIATION OF METROPOLITAN WASHINGTON, D. C., INC. AND ITS EMPLOYER MEMBERS, JOINTLY AND SEVERALLY:

BEKINS MOVING & STORAGE CO.
COLONIAL STORAGE CO.
DISTRICT MOVING & STORAGE INC.
FIDELITY STORAGE CO.
LIONS TRANSFER CO.
MERCHANTS STORAGE CO. OF VA.
MERCHANTS TRANSFER & STORAGE CO.
COLUMBIA VAN LINES CORP.
SECURITY STORAGE CO. OF WASHINGTON
SMITH'S MOVING & STORAGE CO., INC.
UNITED STATES MOVING & STORAGE CO., INC.

and

LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Carl S. Silverman, Esq., for the General Counsel.
Ira M. Shepard, Esq., and *E. Carl Uehlein Jr. Esq.* (*Morgan, Lewis, Bockius, Esqs.*) of Washington, D. C. for Respondents.
Thomas J. Hart, Esq. and *Irwin Mininberg, Esq.*, (*Lippman, Mininberg and Hart Esqs.*) of Washington, D. C., for the Charging Party.

Decision

STATEMENT OF THE CASE

ARTHUR LEFF, Administrative Law Judge: Upon a charge filed by the above named Union on April 3, 1975, the General

Counsel of the National Labor Relations Board, by the Regional Director of Region 5, issued a complaint, dated May 7 1975, against the above named Association and its Employer Members, jointly and severally (herein collectively referred to as Respondent), alleging that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act in respects to be specified below. A hearing was held at Washington, D.C., on May 19 and 20, 1975. Briefs were filed by the parties on July 1, 1975.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondents

Movers and Warehousemen's Association of Metropolitan Washington, D.C., Inc., herein interchangeably referred to as the Association or MAWA, is a District of Columbia corporation which exists for the purpose of negotiating and entering into collective-bargaining agreements with the Union on behalf of its employer members. The Association's members are engaged in the assembly, packing, storage, and local and interstate transportation by motor carrier of household goods, office equipment, and furniture. During the past 12 months, a representative period, the Association's members individually and collectively had gross revenues exceeding $50,000 from the interstate transportation of household goods, office equipment, and furniture. The complaint alleges, the answer admits, and it is found, that Respondent is an "employer," as defined in Section 2(2) of the Act engaged in "commerce" and in operations "affecting commerce," within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The complaint alleges in substance that Respondent violated Section 8(a)(1), (3), and (5) of the Act by (a) threatening to lock out employees of Respondent represented by the Union unless the Union should agree to submit Respondent's "final" contract offer for ratification by a mail ballot vote to be conducted by the Federal Mediation and Conciliation Service, and (b) discriminatorily locking out such employees on April 1, 1975, and continuing that lockout in effect until April 28, 1975, because the Union failed and refused to submit the Respondent's "final" contract offer for ratification in the particular manner specified by Respondent.

Respondent in addition to denying the aforesaid allegations of the complaint, affirmatively alleges in its answer that the sole purpose of the lockout which began on April 1, 1975, was "to bring economic pressure in support of [the Employer's] bargaining position, and to avoid a strike during the Employer's busy summer season." Alternatively, it is Respondent's position that even if the lockout is found to have been unlawful at its inception, it ceased to be such on April 2, 1975.

B. *Some Background Facts*

The Union is the recognized exclusive bargainng representative of an appropriate multiemployer bargaining unit composed of the employees defined in the marginal

note [1] who are employed by MAWA members who have authorized that Association to represent them in the negotiation and/or execution of collective-bargaining contracts with the Union.[2]

MAWA was not formally organized as an employer association until 1969. The record shows, however, that for more than 20 years it had been the practice of the unionized moving companies in the Washington, D.C. area, including the companies that now are members of MAWA, to bargain as a group with the Union. That bargaining relationship has been marked by stability and labor peace. It is undisputed that throughout that 20-year history of bargaining the Union has never engaged in a strike or work stoppage to support its bargaining demands—and this even though there were some occasions during that period when negotiations for a successor agreement were not finally completed until some time after the expiration of the previous agreement.

The moving industry in the Washington, D.C. area is characterized by seasonal trends. Most of the industry's business is done between May 15 and October 15. The collective-bargaining agreements prior to 1969 contained a May 31 expiration date. During the 1969 negotiations, the expiration date was changed to March 31, and has

[1] All drivers, helpers, packers, freighters, warehousemen, tow-motor operators, foremen, and such other employees as may be presently or hereafter represented by the Union, but excluding clerical employees, guards, and supervisors as defined in the Act, engaged in household moving and storage within the jurisdiction of the Union.

[2] The collective-bargaining agreement which was entered into between the MAWA and the Union following the events here in controversy identifies as the MAWA-represented employers in the negotiation of that agreement all of the companies listed in the caption of this case, except for Merchants Transfer and Storage Co., which, the record shows, is the parent company of Merchants Storage Co. of Virginia.

remained so in the labor contracts since negotiated. The change in date was effected at the request of the employers who wished to avoid contract negotiations during their peak busy period when they were most vulnerable to a strike.

A significant amount of business available for moving companies in the Washington, D.C. area consists of Government contract work which is obtained on bid. Three of the major Government contracts, for State Department outbound, inbound, and baggage moving work, were to expire on February 28, 1975, with bids for new contracts due sometime before that date. Before that due date, several of the MAWA members, acting as a group, arranged with the State Department to extend the term of the old contracts to April 30, 1975, and the bidding date on the new contracts to April 15, 1975, so that before submitting their bids they might be able to know what their future wage costs would be under the new labor contract with the Union that was then coming up for negotiations.

The Teamsters' International Constitution requires that collective-bargaining contracts negotiated by Teamsters' Local members must be ratified by the union members involved in the negotiations before such contracts can become effective. Normally a majority vote is required for acceptance or rejection. Under certain circumstances, however, i.e., when a strike vote is contemplated, an offer can be rejected only by a two-thirds vote of the affected membership. The applicable provisions are spelled out in Article XII, Section 1(b) of the Teamsters Constitution. In relevant part, they are as follows:

> (b) Contracts may be accepted by a majority vote of those members involved in negotiations and voting, or a majority of such members may direct further negotiations before a final vote on the employer's offer is taken, as directed by the Local Union Executive

> Board. When in the judgment of the Local Union Executive Board, an employer has made a final offer of settlement, such offer must be submitted to the involved membership and can be rejected only by a two-thirds (⅔) vote of the members involved in the negotiations and voting or responding to a referendum mail ballot. If a settlement cannot be reached, the Local Union Executive Board shall order a secret ballot to be taken and it shall require a two-thirds (⅔) majority of the members of the Local Union involved in such negotiations and voting to adopt a motion to strike. . . . The failure of such membership to authorize a strike upon rejecting the employer's last offer shall require the Local Union Executive Board to accept such last offer or such additional provisions as can be negotiated by it.

The basic issue in this case relates to the legality of a lockout which occurred in the course of negotiations between MAWA and the Union for a new labor contract to supersede the earlier 1972-75 contract between the same parties which terminated on March 31, 1975. Negotiations for that earlier contract had been conducted on behalf of the Union by one of its business agents, Everhart. Frank De Brouse, the president and top official of the Union, had not participated in those negotiations. The MAWA's "final" proposal for that contract had been submitted to the unit employees for ratification under a voting procedure known as a "barn vote"—i.e., one in which the balloting was conducted at the places of employment of the unit employees, rather than at the Union hall. Moreover, under the voting procedure used in 1972 a two-thirds negative vote was required for rejection of the MAWA "final" offer. The 1972-1975 contract had been ratified under that procedure although, in fact, less than a majority had voted to accept the contract. De Brouse had been displeased with the 1972 contract, particularly with certain

of its health and welfare and pension provisions. In conversations with management representatives during the term of the 1972-1975 contract, De Brouse had frequently voiced his displeasure with that contract, as well as with the voting procedure that had been used for its ratification, and had stated that he would never allow a barn-by-barn vote to happen again.

De Brouse designated Business Agent Roland Warren in the place of Everhart as the Union agent who was to conduct the 1975 negotiations. In preparing for the 1975 negotiations, Warren met with the Union's shop stewards in the industry who complained to him about the voting procedures that had been used in 1972, claiming that the vote in 1972 had been improperly influenced by employer intervention. Warren pledged that votes on the 1975 contract would take place in the Union hall and not at the individual "barns" of MAWA members. At the first negotiating meeting on the 1975 contract, Warren informed the MAWA representatives of the commitment he had made.

C. *Events Leading to the Lockout on April 1*

About 90 days before the March 31, 1975, expiration date of the 1972-1975 contract, the Union served notice on Respondents of its desire to modify the terms of that contract, stating that it would send its proposal to Respondents "in the near future." It had been the practice of the parties in the past to start actual negotiations for a new contract about a month before the expiration date of the old contract. In 1975, the MAWA did not press for an earlier starting date. On February 28, 1975, Virgil Seward, the chairman of the MAWA negotiating committee, in a letter to Union Business Agent Warren, suggested that the first negotiating meeting be scheduled for the first week in March, expressing his hope that "this early start in the negotiations" would produce a mutually beneficial agreement. On March 6, Warren sent Respondent a copy

of the Union's proposals. The first meeting was scheduled for the following Monday, March 10.

Four negotiating sessions were held prior to the April 1 lockout—on March 10, 18, 20, and 25, each one lasting more than 4 hours, and at least one for the entire day.[3] Warren acted as the negotiator for the Union during the first three meetings, and was joined at the March 25 meeting by De Brouse.[4] Virgil Seward, an officer of Merchants Storage Co. of Virginia, served as the chairman of the MAWA negotiating committee. Respondent contended at the hearing that the Union at these meetings deliberately engaged in stalling tactics, disclosing a purpose to extend the negotiations into the busy season. The record does not support that contention.

The March 10 meeting was devoted mainly to an item by item review of the Union's proposals. At this meeting Warren assured the MAWA representatives, in response to their inquiry, that only employees of the MAWA members involved in the negotiations would be permitted to participate in ratification votes. But at the same time he made clear that the Union intended this time to conduct such votes at the Union hall, and not at the barns as in 1972.

The March 18 and 20 meetings were taken up with the consideration of non-economic issues. The MAWA yielded on some of the Union's demands, and others were dropped

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[3] The adjournment from March 10 to March 18 was at the request of the MAWA negotiator. The adjournment from March 20 to March 25, was requested by the Union because of the interim unavailability of De Brouse.

[4] At the March 10 meeting, Warren had informed the MAWA representatives that De Brouse would appear at a later stage of the negotiations since Warren felt he lacked sufficient experience with the moving and storage industry to conclude an agreement by himself.

by the Union. Agreement was reached on a substantial number of matters, including among them items relating to shop steward seniority, the posting of seniority lists, employee warning notices, uniform work rates, funeral leave, meal allowances, petty cash advances, and vacations. By the end of the March 20 meeting, which lasted all day, the negotiating parties had resolved almost all the non-economic issues arising from the Union's proposals.

At the beginning of the March 25 meeting, the first in which De Brouse participated, the Union withdrew three of its non-economic demands not theretofore resolved. That meeting was confined almost entirely to the consideration of wage rates, employer contributions for health and welfare and for pensions, and contract duration. Prior to the March 25 meeting, the MAWA had not submitted any proposals of its own, and discussion of economic items had been deferred pending resolution of other items at issue. The Union in its initial proposal presented on March 6 had asked for a $2 hourly increase for drivers and $1.50 for helpers, apparently on the basis of a 1-year contract, as well as for increases in the amount of the employers' contributions for health and welfare and pensions. At the March 25 meeting, the MAWA offered at first a $.20 per hour wage increase for all employees in each year of a 3-year contract, as well as certain increases in employer contributions for pensions and health and welfare, increases which, while substantial in amount, were less than those asked by the Union. The Union rejected that offer as unrealistic, and later in the meeting counter-proposed a 2-year contract with yearly increases of $.75 per hour for all employees. After further discussion, in the course of which the MAWA made an intermediate offer which was also rejected, the MAWA representatives caucused and then came back with a wage-fringe benefit package on all economic items in dispute, declaring that this was their "final" offer. The "final" offer proposed,

inter alia, a 3-year contract with annual wage increases of $.30, $.30, and $.30 for drivers and $.30, $.30, and $.20 for helpers. That offer was made orally, but the MAWA representatives stated that it would be drawn up in written form, covering all items not previously settled, and would be submitted to the Union so that it might be presented to the unit employees for their acceptance or rejection.

De Brouse agreed to the request of the MAWA negotiators that Respondent's "final" offer be submitted to the bargaining unit employees for a vote. But at the same time he made clear that he would not recommend the offer for acceptance. Seward for MAWA requested that the vote be conducted in the barns in accordance with the procedure the Union had adopted for the ratification of the 1972 contract, stating *inter alia*, that "we couldn't get a contract at the hall," if De Brouse was unwilling to "sell" it. But De Brouse rejected that request, reminding Seward that Warren had made a commitment that any votes that were to take place on the question of contract ratification would be conducted at the Union hall. No suggestion was made at this meeting by the MAWA representatives for a mail ballot. When pressed for a date when the matter would be brought to a vote, De Brouse stated that because of the upcoming holiday weekend [5] and his personal commitments, the earliest date on which the vote could be held would be the following Tuesday, April 1, 1975.

As the March 25 meeting was about to break up, either Warren or De Brouse, noting that March 31 would mark the expiration date of the then existing contract and that it now appeared that a contract could not be consummated

[5] March 28 was Good Friday, and the Union's offices were to be closed for a holiday beginning that afternoon and extending through Easter Monday, March 31.

by that date, asked what the MAWA position was on retroactivity. Seward replied that he had no authority from the Association to agree on retroactivity but that he would take up the matter with the Association's members and would let the Union know after he had done so.[6]

On March 27, 1975, the Association transmitted to the Union the complete written summary of the MAWA "final" offer which at the March 25 meeting it had told the Union it would prepare. The document was entitled "Final Employer Offer." The Association in its letter to the Union accompanying the written statement of its offer alluded to the Union's request for retroactivity and set forth its position on that question as follows:

> At the conclusion of the employers presentation on March 25, 1975, and after an extensive discussion of

[6] Seward testified that when he told De Brouse that he would have to submit the question of retroactivity to the Association's members, De Brouse remarked, "If you don't agree to retroactivity we will have to hit the streets April 1." Warren disclaimed any recollection of such a statement having been made, and De Brouse, although not questioned specifically about that statement, testified in general terms that there was no "discussion" of striking at the meeting. Although Seward's testimony in a number of other respects revealed him to be less than a fully credible witness, his testimony in this respect was corroborated by Fleming Newboldt, a director of Merchant's Transfer and Storage Co., who had been present as an observer at the March 25 meeting. Newboldt impressed me as a reliable witness, and his testimony evidenced a vivid recollection of this incident. I credit Seward's testimony as corroborated by Newboldt, and find that De Brouse made the remark attributed to him by Seward and Newboldt. Subsequent events reveal, however, that Respondent did not really believe that the Union would strike on April 1 if retroactivity was not earlier agreed upon. Quite clearly, Respondent would not have locked out its employees on April 1 had it believed they were about to strike that day. The record shows, moreover, that the MAWA representatives were aware at that time that a strike could not be called by the Union unless and until the MAWA "final" offer was first submitted to a ratification vote and rejected by a two-thirds negative vote.

the offer, the Local Union's Bargaining Committee requested that the employer committee agree to retroactivity. That is, the Local Union indicated that it would be physically impossible to call a meeting of the employees covered by the moving and storage collective-bargaining agreement until at least Tuesday, April 1, 1975, and therefore requested that the employer committee agree to make the increases retroactive. The Employer Negotiating Committee informed the Local that they would take the request for retroactivity under advisement and provide the Local with an answer as soon as possible.

This letter is to inform you that the Employer Committee will agree to retroactivity of the final offer contained herein, from April 1, 1975, through and including April 7, 1975, subject to Local 639 submitting this offer as a final offer of settlement to the employees covered by the collective-bargaining agreement through a referendum mail ballot pursuant to the terms of Article XII, Section 1(b) of the International Constitution. Under the terms of this Article the offer can be rejected only by a two-thirds (⅔) vote of the members involved in the negotiations and voting or responding to the referendum mail ballot. The balloting of the membership would be conducted under the auspices of Mr. Harold Mills, the mediator assigned to these negotiations by the Federal Mediation and Conciliation Service. Ballots will be returned to Mr. Mills and he would provide both Local 639 and the Employer Committee with the results of the membership ballotting no later than 4 p.m., Monday, April 7, 1975.

• • • •

If the above proposal concerning retroactivity and a mail ballot is acceptable to the local union, our Negotiating Committee will cooperate in every way with the union representatives to insure that the mail ballot is accurately prepared and distributed to all employees covered by the collective-bargaining agreement no later than Friday, March 28, 1975. Please notify us no later than tomorrow morning if this proposal is acceptable.

On March 27 or 28, De Brouse telephoned Seward and rejected the mail ballot ratification procedure the MAWA had proposed in its March 27 letter. De Brouse, as appears from his testimony, credited in this respect, told Seward that he had apparently misread the provisions of the International's Constitution relating to voting procedures on contract proposals. De Brouse explained that a simple majority was all that was required for acceptance or rejection of a contract proposal; that the two-third rejection rule was applicable only when in the judgment of the Local's executive board the offer was a final one with strike action as the only apparent alternative to acceptance; and that in this instance even if the Union's executive board were to take action to authorize the two-third rejection rule, the vote would have to be taken at the Union hall because of the commitment Warren had made. Seward's only response was that the MAWA offer was a "final" one.

On March 31, 1975, Seward for the MAWA addressed a letter to De Brouse, which he read to Warren over the telephone that morning.[7] Seward began his letter by referring to a telephone conversation he had had with De Brouse and Warren on March 28, in which, he stated, they had "rejected the [MAWA] final offer for a 3-year collec-

[7] The Union office was closed that day. Seward, however, was able to contact Warren at the home of out-of-town relatives whom he was then visiting.

tive-bargaining agreement in the [MAWA] letter of March 27, 1975." The letter then went on to declare:

> As we advised you, the Association's membership cannot afford to operate after the March 31, 1975, expiration of the current collective-bargaining contract without the stability of a continuing labor agreement. Therefore, unless you advise us today that you will submit the employers' final offer to the membership by way of the mail ballot procedure we proposed to you on March 27, 1975, with the provision that the employers offer would be retroactive from April 7, 1975, back to April 1, 1975, in order to allow the counting of ballots, the Association's membership will be forced to terminate operations by bargaining unit personnel on Tuesday, April 1, 1975.

On April 1, 1975, the MAWA members suspended operations, laying off all the bargaining unit employees. The lockout continued until April 28, 1975.

D. *Events Following the Lockout*

De Brouse testified that in telephone conversations with Seward on March 31, following receipt of the MAWA letter of that date, and again on April 1, he told Seward that the Union would regard lockout action by the MAWA members as an unfair labor practice. De Brouse's testimony, although not entirely clear in this respect, indicates that on April 1 he also informed Seward that the Union was in process of preparing unfair labor practice charges against Respondent.[8] De Brouse's testimony to the foregoing effect, although disputed by Seward, is credited.

On April 2, 1975, Seward, after conferring with MAWA counsel addressed a letter to De Brouse, which was prepared for his signature. The letter strongly suggests that, as a result of a telephone conversation between Seward and De Brouse after the institution of the lockout, the Association had become concerned that its lockout action might be viewed as an unfair labor practice because of the choice given the Union in the Association's letter of March 31 of either agreeing to the specific ratification procedure the Association had proposed or suffering a lockout, and that the Association had now decided that it would be prudent to revise its previously declared position in that respect.

[8] The charge in this case, which is signed by the Union's attorney, is dated April 1, 1975. It was not filed with the Regional Office, however until April 3, and was served on April 4.

In his letter of April 2, addressed to De Brouse, Seward stated in part:

> In response to your telephone call of yesterday, it is important to reiterate the reason why the employers found it necessary to terminate their operations on April 1, 1975. It appears that your feel that the employers temporarily terminated their operations because Local 639 would not agree to a secret ballot, FMCS supervised, referendum as ratification procedure for the final employer offer. It is the employers position that you are free to use whatever means you deem appropriate to ratify the employers' final offer. This is a matter solely up to the Union in handling internal union affairs.

The letter then went on to state in substance that the Association had initially, on March 27, suggested the FMCS supervised mail ballot procedure along with one week's retroactivity only as a counterproposal to the Union's demand for open-ended retroactivity; that in its March 3, letter the Association had renewed that counterproposal, although it had earlier been rejected, as a "procedure" which would have allowed employers' operations to continue while the employees were given an opportunity to vote on the Association's "final" contract offer; and

that when that counterproposal was again rejected, the employers had decided to "temporarily terminate operations until agreement could be reached on a renewal contract. The temporary termination—the letter concluded—"continues only because there is no labor contract. We remain available to meet with representatives of the Local to resolve the matter."

When the Association's April 2 letter was sent, the Union had already scheduled a meeting to be held at the Union hall on the afternoon of April 2 for employee consideration of the Association's contract offer. At the Union meeting held at that time, the employees voted to reject the offer.

Immediately following the Union meeting on April 2, the MAWA negotiators met with the Union's negotiators at the latter's request. The Union informed the Association of the employees' rejection of the Association's offer; stated that its demand was still for a 2-year contract with economic terms substantially the same as they had been on March 25; and proposed that the lockout be halted while negotiations continued. The Association reiterated its final economic proposal of March 27, and declared that it would continue its lockout until the parties reached a contract. Both sides remained adamant at that meeting in their previously declared contract positions.

Thereafter, the parties had some five bargaining sessions under the auspices of a FMCS mediator—On April 4, 16, 21, 23 and 24. The General Counsel stipulated that both parties bargained in good faith during these meetings. No progress was made at the meeting of April 4, but, beginning with the meeting of April 16, both the Association and the Union made substantial modifications in their respective positions, gradually narrowing the area of their differences. A proposal made by the Association on April 21 was taken to employees for a referendum

vote at the Union hall, but was rejected. Thereafter, after further modifications were made by each side in their bargaining positions, a tentative agreement was reached on April 24 between the Union and Association negotiators which provided, *inter alia,* for a 3-year contract, with annual wage increases of $.50, $.40 and $.40 for drivers and $.40, $.35 and $.35 for helpers. That agreement was ratified at a meeting at the Union hall on Monday, April 28. On the same day the MAWA employers ended the lockout.

E. *Analysis and Concluding Findings*

1.

Although this case was litigated on a broader basis, the scope of the complaint is a narrow one. As noted above, the complaint alleges in substance that Respondent violated Section 8(a)(1), (3), and (5) of the Act by (a) threatening to lock out the bargaining unit employees unless the Union agreed to submit Respondent's "final" contract offer to its employees for a ratification vote under the particular mail ballot procedure specified by Respondent, and no other; (b) locking out the employees on April 1, 1975, because the Union failed and refused so to agree; and (c) continuing the lockout in effect until April 28, 1975, for the same reason. I am satisfied that under applicable principles of law the record supports violation findings with respect to the complaint's allegations identified immediately above as (a) and (b), but not as to (c)—and this for the reasons to be stated below.

2.

The threat referred to in the complaint is to be found in the Association's letter to the Union, dated March 31, 1975, wherein the Association informed the Union that unless the Union agreed that day to submit Respondent's "final" contract offer to a referendum vote of its mem-

bership to be conducted under the particular procedure specified by Respondent—FMCS supervised mail balloting with a two-thirds negative vote required for rejection—the Respondent employers would terminate operations by bargaining unit personnel on April 1, 1975. The Union previously, at the March 25 meeting, while agreeing to submit Respondent's "final" offer for a referendum vote by unit employees, had made clear its intent to conduct that vote at the Union hall where its president, De Brouse, could express his objections to the offer in a face-to-face meeting with the affected employees. As the record reveals, the ratification procedure desired by the Union was displeasing to Respondent's negotiators. They were of the belief that their offer would stand little chance of gaining employee approval of that procedure were followed, particularly with De Brouse opposing Respondent's contract offer.

It is evident that Respondent's negotiators were determined, as part of their bargainng strategy, to impose upon the Union if they could a ratification procedure more to their liking, one under which the vote would be conducted away from the Union hall, with a minority vote of one-third plus one enough to obtain approval of Respondent's offer. Thus, at the meeting of March 25, Respondent's representatives pressed for a barn-by-barn ratification vote procedure, such as had been used in 1972, though they previously had been made aware of the Union's commitment to its membership not to repeat that procedure in 1975. Also at that meeting, Respondent's negotiators sought to lay the foundation for a one-third-plus-one approval vote by labeling their offer a "final" one.[9] At the March 25 meeting, the Union reiterated its firm intent

[9] As Respondent's brief concedes, the Association's negotiators were then under the mistaken belief that by so characterizing the offer the Union would be obliged under its constitution to adopt a ratification procedure that required a two-thirds vote for rejection.

to conduct all ratification votes that year at the Union hall. Nevertheless, on March 27, when Respondent submitted its counterproposal to the Union's demand for retroactivity, it conditioned the one week's retroactivity it offered upon the Union's adopting a mail balloting voting procedure on its contract offer, with a two-thirds vote required for rejection.[10] The Union rejected the mail ballot ratification procedure proposed in the March 27 letter, once again reiterated its intention to conduct the ratification vote at the Union hall, and also made Respondent's negotiators aware of their misinterpretation of the provisions in the Teamsters Constitution relating to ratification vote requirements. Notwithstanding all this, Respondent persisted in its effort to obtain the form of ratification vote *it* wanted via its March 31 letter.

Respondent asserts in its brief that its only reason for referring in its March 31 letter to the mail ballot procedure was to show that its previous retroactivity counterproposal (which had already been unequivocally rejected by the Union), was still being offered. I find that explanation unpersuasive. It appears to me to distort the plain sense of the letter. That letter, as I read it, in effect presents the Union with this ultimatum: Either agree to the specific ratification procedure we want (and if you do we will throw in one week's retroactivity as a sweetner) or suffer a lockout beginning tomorrow morning. Similarly, I find unpersuasive Respondent's further assertion that it conditioned the withholding of lockout action upon the Union agreeing to its proposal mail balloting procedure because it wanted to assure the holding of an early rati-

[10] Though a nonmandatory subject of bargaining, the inclusion of that condition in the March 27 counterproposal was not unlawful in itself, for it was not made part of Respondent's general contract offer and, unlike the repetition of that condition in the March 31 letter, it was not accompanied by a threat of lockout if not accepted.

fication vote that would limit the period of the retroactivity it was offering. That assertion would have been more impressive, and indeed might have led me to reach a different conclusion on the issue in this case, had Respondent not restricted the method of ratification procedure that the Union had to agree to if it was to avoid a lockout. As found above, the Union had in fact earlier agreed to conduct a ratification vote on Respondent's contract proposal at the Union hall, though indicating it could not arrange a meeting until April 1 or 2. Mail balloting, a slower procedure, could not have been completed with all ballots counted until April 7 at the earliest. Even if Respondent, as it says, had no definite commitment from the Union that a ratification vote would be held on April 1 or 2, this would not explain why Respondent could not have set a deadline for a ratification vote without also attempting to dictate the manner in which that vote was to be conducted. The fact that Respondent was willing to withhold lockout action pending a ratification vote if the particular method of ratification it wanted was adopted, but not if the Union chose some other method, clearly discloses that Respondent's focus was not in the length of retroactivity, but on the method of ratification.

It is also noted that Respondent in its letter of March 31 expressly conditioned the withholding of lockout action, not on acceptance of Respondent's contract offer, but solely upon acceptance of Respondent's proposed ratification procedure. It is thus evident that, even if Respondent believed that a lockout was desirable to support its bargaining position, it would have withheld such lockout action at least until a referendum vote on its contract offer was completed, had the Union agreed to the particular ratification procedure Respondent was pressing for. This is but another way of expressing the finding I make that Respondent locked out the unit employees on April 1 because the Union failed and refused to agree to submit Respondent's "final"

contract offer for ratification by a FMCS mail ballot vote, as the complaint alleges.

What has been said above clearly refutes Respondent's primary contention in this case, that the "sole purpose" of the lockout action initiated by it on April 1 "was to bring economic pressure in support of [its] bargaining position, and to avoid a strike during [its] busy season." Respondent's ultimate objective, of course, was to obtain a contract satisfactory to it. But its immediate object in presenting its ultimatum to the Union on March 31, and in implementing that ultimatum with the lockout action taken the following day, I am convinced and find, was to force the Union to yield to its position on the ratification procedure to be adopted on its then pending "final" contract offer.

It is well settled law that where a lockout has a duality of objectives, one lawful, the other not, the presence of the lawful objective does not immunize the lockout from condemnation under the Act.[11] Left for consideration, then, is the question whether Respondent's effort through use of coercive measures to adopt the form of ratification procedure it wanted was unlawful under the Act. For the reasons now to be stated, I find that it was.

Procedures relating to the ratification of contracts are internal union matters and are not mandatory subjects of bargaining. Although an employer may request bargaining on such matters, it has been held to be a *per se* violation of Section 8(a)(5) and (1) of the Act for him to insist on pushing his position to an impasse.[12] In the *Houchen's*

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[11] See, e.g., *Wire Products Manufacturing Co.*, 198 NLRB No. 90.

[12] See, *N.L.R.B.* v. *Wooster Division of Borg Warner Corporation*, 356 U.S. 342; *Houchen's Market of Elizabethtown, Inc.* v. *N.L.R.B.*, 375 F.2d 208, 212 (C.A. 6); *Southwest Michigan Gas Company*, 206 NLRB No. 18; *Darlington Veneer Co.*, 113 NLRB No. 18; *Darlington Veneer Co.*, 113 NLRB 1101, enf'd. 236 F.2d 85 (C.A. 5).

Market case, the Court explained its holding to that effect as follows:

> The Company, by insisting . . . that the contract be approved or ratified by a majority of the employees, was attempting to bargain not with respect to "wages, hours and other terms and conditions of employment" but with respect to a matter which was exclusively within the internal domain of the Union Members of a union have the right to determine the extent of authority delegated to their bargaining unit. It is within their province to determine whether or not their bargaining unit may enter into a binding contract with or without membership ratification. It is not an issue which the Company can insist upon without mutual agreement by the Union, any more than the Union can insist that the contract be submitted to the Board of Directors or stockholders of the Company.

And in the *Borg Warner* case, *supra,* where the Supreme Court upheld the Board's finding that it was a violation of Section 8(a)(1) and (5) of the Act for an employer to condition the acceptance of a collective-bargaining agreement on the inclusion of a strike "ballot" clause, the Supreme Court as one of the reasons for its holding, stated, at p. 350:

> [The ballot clause] substantially modifies the collective bargaining system provided for in the statute by weakening the independence of the representative chosen by the employees.

Respondent contends that the cited cases are inapposite here because in each of them the employer was insisting on its proposed ratification provision as a condition precedent to the consumation of *any* agreement, whereas that is not true in the case at hand. Plainly, if it is unlawful for an employee to insist to an impasse upon a particular method

of ratification, it is also unlawful for him to utilize the far more drastic economic pressure of a lockout in an effort to achieve the same objective. Here, no less than in the cited cases, Respondent's conduct involved an unwaranted and coercive intrusion into the Union's internal affairs that was at war with its bargaining obligation to accord the Union the full measure of recognition that is its statutory due. In that sense, I find, Respondent's conduct amounted to a refusal to bargain with the Union in good faith in violation of Section 8(a)(5) of the Act.

In any event, more is involved here than simply the question of whether Respondent's complained of conduct amounted to a lack of good faith bargaining within the meaning of Section 8(a)(5). Also involved is the question whether, apart from a refusal to bargain, Respondent's conduct constituted an independent violation of Section 8(a)(1). I find that it did. There can be little doubt that, in furtherance of their Section 7 right to engage in self-organization and to bargain collectively through their own representatives, employees may delegate to their duly designated bargaining agent authority to act on their behalf to regulate internal union affairs, including whether, when, or how employer contracts are to be submitted for ratification. In taking the position it did on the subject of ratification, the Union was thus exercising on behalf of the represented employees a statutorily protected employee right. It follows that Respondent's coercive conduct aimed at pressuring the Union to alter its position on that subject trenched upon employee rights in violation of Section 8(a)(1). I so find. I further find that Respondent's action in laying off (locking out) the employees was also violative of Section 8(a)(3) since it constituted union-related discrimination in employment of a kind that inherently discourages union membership.[13]

[13] It is noted, however, that the remedial Order recommended below would be the same whether such conduct is found violative of Section 8(a)(1) or 8(a)(3) or both.

3.

Having found that the lockout was unlawfully instituted by Respondent on April 1, 1975, I turn now to consider the issue raised by Respondent's alternative defense that the 4-week lockout that began on April 1, 1975, even if unlawful at its inception, ceased to be so on April 2, 1975. For the reasons stated below, I find merit in that defense.

It has been found above that, but for the Union's refusal to agree to the mail ballot balloting ratification procedure Respondent had proposed, Respondent would have withheld lockout action at least until its then pending contract offer was submitted to an employee referendum vote. Respondent's unlawful objective to force the Union to yield to the particular ratification procedure Respondent had proposed failed of its purpose on April 2, 1975, when the Union conducted a referendum vote at the Union hall and the contract offer was voted down. On the same day, Respondent retracted the unlawful condition for lockout avoidance stated in its letter of March 31, and made it clear to the Union that it was continuing its lockout only to bolster its position on its contract offer.

In *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, the Supreme Court ruled that an employer does not violate the Act when he locks out his employees " for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position" It is true, as the Union emphasizes, that the Supreme Court expressly limited its holding in that case to lockouts occurring after a bargaining impasse was reached. But I find no need to determine the issue litigated in this case as to whether there was a bargaining impasse at the time of the lockout. Subsequent Board decisions have extended the rationale of *American Ship Building* to pre-impasse lockout.[14] Under

[14] See, e.g., *Evening News Association*, 166 NLRB 219; *Darling and Co.*, 171 NLRB 801, aff'd., *sub. nom., Lane* v. *N.L.R.B.*, 418 F. 2d 1208 (C.A.D.C.); *Stokely-Van Camp.*, 186 NLRB 440, 450-451.

the Board's current view, as I understand it, bargaining lockouts are presumptively priviliged even when they occur prior to a bargaining impasse. That presumption may be overcome only if it is shown by all the surrounding circumstances that the lockout was motivated wholly or in significant part, but a purpose to evade the duty to bargain, to discourage union activity, or to achieve some other objective that is inherently destructive of employee rights. The absence of an impasse may in certain situations be a relevant fact to be weighed in the balance in determining whether the totality of circumstances are such as to support an inference that the lockout was unlawfully motivated. But it is not alone enough to establish a *per se* violation. Nor, does the Board now require, as it did prior to *American Ship Building*, that an employer, to justify a bargaining lockouts must demonstrate the existence of operational or other special economic circumstances in kind and degree to support a finding that the lockout was warranted as a necessary defensive measure to counter threatened strike action.[15]

There is no evidence in this case that Respondent's continuation of its lockout after April 2 was motivated in whole or in part by any unlawful consideration or was otherwise in the service of any design inimical to the process of collective bargaining. Indeed, the General Counsel stipulated at the hearing that Respondent at all times after April 2 bargained with the Union in good faith. Nor can it be said in this case that Respondent's continuation of the lockout after April 2 was entirely devoid of economic justification. Respondent's interest in forcing an early resolution of its contract dispute with the Union in order to avoid crisis bargaining during its approaching busy season cannot be regarded as either improper or insignificant. Moreover, the Union had given Respondent reason

[15] Cf. *Duluth Bottling Association*, 48 NLRB 1335, 1359-60; *Betts Cadillac-Olds Inc.*, 96 NLRB 268.

to believe that it would not enter into a contract settlement without retroactivity and would strike if necessary to obtain it. As the Respondent employers were engaged in a service industry where quoted prices had to be certain, and as such prices were based in large measure on labor costs, Respondent also had a significant economic interest in suspending operations during a period when its labor costs would be uncertain.

The General Counsel and the Union argue broadly that where, as here, a lockout unlawful at its inception is continued without physical hiatus, it must, as a matter of law, be deemed to retain its initial taint of illegality for its duration, and this though the condition which initially made it unlawful has been eliminated. Neither the General Counsel nor the Union have cited any apposite authority to support their contention in this respect.[16] As applied to a situation such as is present here, I am convinced that their contention has no validity. Had Respondent in this case terminated its lockout on April 2, and then had, say on April 3, reinstated it, for the sole purpose of supporting its legitimate bargaining position, there could not possibly be any question as to the legitimacy of the lockout begun on April 3. Indeed, the argument made by the General Counsel and the Union appears inferentially to concede as much. Here, Respondent did

[16] The General Counsel's brief cites no cases at all. The Union's brief relies principally on Board cases involving strikes in violation of the notice requirements of Section 8(d) or picketing in violation of Section 8(b)(7)(B). (See, e.g., *Retail Clerks Local 1179*, 109 NLRB 754; *Typographical Union No. 570 (Kansas Color Press)*, 158 NLRB 1332. Contrary to the assertion of the Union, the cited cases are not analogous since they are concerned with situations as to which clearly expressed statutory policies are applicable. Moreover, it clearly appears that the strike or picketing conduct found unlawful in the cited cases was unlawful under the applicable statutory provision not only at the inception of such activity, but throughout its course.

not go through these motions, but the events of April 2, as found above, were nevertheless such as to make it crystal clear that Respondent was no longer utilizing the lockout for the objective that had made it unlawful when it began. To reach a different result in these circumstances simply because the lockout was continued without a break, would be only to exalt form over substance.

The General Counsel and the Union also make the further and somewhat related argument that Respondent should in any event be required, as a matter of remedy, to make the affected employees whole for their loss of earnings during the entire period the lockout continued in force. Although not too clearly articulated in their briefs, their theory appears to be that Respondent, having unlawfully laid off (locked out) employees on April 1, became obligated to remedy that violation by terminating the lockout and reinstating the unlawfully laid off employees to their jobs, and that since Respondent failed to do so April 28, when it terminated the lockout, it should now be assessed with backpay liability up to the actual date of their reinstatement. The flaw in that argument is that it is based on an assumption that work would have been available for the employees between April 2 and April 28. The fact is, however, that no work was available during that period because, as found above, Respondent's operations were then legitimately suspended. In short, the employees loss of earnings between April 2 and 28 was not linked to Respondent's failure to remedy the unfair labor practices herein found.

Accordingly, I conclude that Respondent's lockout of the unit employees, although violative of Section 8(a)(1), (3) and (5) at its inception, ceased to be so April 2, 1975.

Conclusions of Law

1. All employees in the categories listed in footnote 1, above, other than excluded categories, who are employed

by Employers that are members of, and are represented for purposes of bargaining with the Union by, the Association constitute a unit appropriate for the purposes of collective bargainng, within the meaning of Section 9(b) of the Act.

2. The Union at all times material to this proceeding has been, and now is, the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargainng, within the meaning of Section 9(a) of the Act.

3. By threatening to lock out the employees in the appropriate unit if the Union did not agree to submit Respondent's contract offer for ratification by employees in the particular manner Respondent had specified, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By locking out the employees in the appropriate unit on April 1, 1975, and continuing said lockout until April 2, 1975, because the Union failed and refused to submit Respondent's final contract offer for ratification by the unit employees in the manner that Respondent had specified, Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(1), (3), and (5) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not engage in unfair labor practices within the meaning of the Act by continuing to lock out the unit employees after April 2, 1975.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent

be ordered to cease and desist from them, and from like and related unfair labor practices, and that it take the affirmative action provided for in the recommended Order, below, which I find necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully locked out the bargaining unit employees on April 1, 1975, and continued that lockout for an unlawful objective until April 2, 1975, it will be recommended that Respondent be ordered to make such employees whole for any loss of pay they may have suffered by reason of such unlawful conduct, by payment to each of them of a sum of money equal to that which he would have normally earned as wages on April 1 and 2, 1975, less his net earning on such dates, such sums to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing and Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[17]

Order

Respondent, Movers and Warehousemen's Association of Metropolitan Washington, D.C., Inc., and the Employer Members of said Association, namely, Bekins Moving & Storage Co., Colonial Storage Co., District Moving & Storage Inc., Fideiity Storage Co., Lions Transfer Co., Merchants Storage Co. of Va., Columbia Van Lines Corp., Security Storage Co. of Washington, Smith's Moving and

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[17] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Storage Co., Inc., and United States Moving & Storage Co., their respective officers, agents, successors, and assigns, shall, jointly and severally:

1. Cease and desist from:

(a) Threatening employees in the appropriate bargaining unit with lockouts or layoffs, where an object thereof is force their bargaining representative to agree to methods or procedures proposed by Respondent for the ratification of contract offers.

(b) Discouraging membership in Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, by discriminatorily locking out or laying off any of its employees, or discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of employment.

(c) Refusing to bargain collectively in good faith with the aforementioned Union, as the exclusive bargaining representative of all employees in the appropriate unit stated in paragraph 1 of the Conclusions of Law, above, by engaging in, or threatening to engage in lockouts, layoffs, or other retaliatory measures adversely affecting the earnings of the bargaining unit employees, where an object thereof is to force the Union to adopt methods or procedures proposed by Respondent for the ratification of contract offers.

(d) In any like or related manner, interfering, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Make whole all employees in the appropriate bargaining unit stated in paragraph 1 of the Conclusions of Law for any loss of pay they may have suffered on April

1 and 2, 1975, by reason of Respondent's unfair labor practices herein found, in the manner set forth in the section above, entitled "The Remedy."

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the backpay due under the terms of this Order.

(c) Post at each facility of the Employer Members of the Association at which employees in the appropriate bargaining unit are employed, or out of which they work, copies of the notice attached hereto and marked "Appendix"[18] Copies of the notice, on forms provided by the Regional Director of Region 5, after being signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ ARTHUR LEFF
Arthur Leff
Administrative Law Judge

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[18] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Section 8(a)(1), (3), and (5) of Labor-Management-Relations Act of 1947, as amended, 29 U.S.C., § 158(a)(1), (3), and (5):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same

terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10(b) and (c) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 160(b) and (c):

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint

and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization

national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

No. 76-1649

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In the Supreme Court of the United States

OCTOBER TERM, 1977

MOVERS AND WAREHOUSEMEN'S ASSOCIATION OF METROPOLITAN WASHINGTON, D.C., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 550 F. 2d 962. The decision and order of the National Labor Relations Board (Pet. App. 10a-19a, 25a-55a) are reported at 224 NLRB 356.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1977. The petition for a writ of certiorari was filed on May 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's conclusion that the employers failed to dissipate the effects of an unlawful lockout before attempting to continue the lockout for a lawful reason.

STATEMENT

1. Petitioner Movers Association represents its constituent members in collective bargaining negotiations with Local Union No. 639, International Brotherhood of Teamsters ("the Union"). The constituent employers have bargained with the Union for more than 20 years (Pet. App. 11a).

In March 1975 the Association and the Union commenced negotiations to replace their existing bargaining agreement, which was due to expire at the end of that month. The Union submitted a proposed contract at the first meeting, and one of its representatives informed the Association's negotiators that the procedure used in ratifying the previous agreement would not be used again (Pet. App. 11a, 32a).[1] Four bargaining sessions were held; at the meeting on March 25 the Association made a "final" offer. The Union agreed to submit this offer to the membership, but without a recommendation for its acceptance (*id.* at 11a). On March 27 the Association

[1]The Teamsters International Constitution requires that collective bargaining agreements be ratified by the affected members (Pet. App. 29a-30a). The Union was dissatisfied with the procedure used in the previous negotiations because it involved a "barn vote" (a separate vote at each employer's premises) rather than a single vote at the Union hall, and because the contract offer would be accepted unless two-thirds of the members objected (Pet. App. 30a). The Union interpreted the Teamsters Constitution as requiring only a simple majority for ratification or rejection, except when a strike was the only alternative to rejection (Pet. App. 37a).

submitted its written proposal and requested ratification through a mail ballot referendum, in which the contract offer could be rejected "only by a two-thirds (2/3) vote of the members involved in the negotiations and voting or responding to the referendum mail ballot" (*id.* at 36a). The Union rejected this request (*id.* at 12a, 37a).

On March 31 the Association delivered to the Union a letter stating that unless the Union accepted the Association's ratification proposal that same day, "the Association's membership will be forced to terminate operations by bargaining unit personnel on Tuesday, April 1, 1975" (Pet. App. 38a). That day the Union told the Association that the ratification demand was improper and the threatened lockout would be an unfair labor practice; the Union also sent a telegram to the Association's attorney stating that "if the Moving and Storage Association locks out its employees it is in violation of their agreement and the contract will not be settled until each employee is paid for all lost earnings" (*id.* at 12a).

All bargaining unit employees were locked out on April 1. That same day, in response to the telegram to its attorney, the Association delivered a letter to the Union asserting that it was not in violation of its collective-bargaining agreement or the National Labor Relations Act and that "none of the employees involved * * * are [*sic*] entitled to backpay" (*id.* at 12a, 38a).

The Association delivered a letter to the Union on April 2 retreating from its position. This letter stated in part (Pet. App. 12a-13a, 39a):

> In response to your telephone call of yesterday, it is important to reiterate the reason why the employers found it necessary to terminate their operations on

> April 1, 1975. It appears that you feel that the employers temporarily terminated their operations because Local 639 would not agree to a secret ballot, FMCS supervised, referendum as ratification procedure for the final employer offer. It is the employers' position that you are free to use whatever means you deem appropriate to ratify the employers' final offer. This is a matter solely up to the Union in handling internal affairs.

The letter concluded that the lockout "continues only because there is no labor contract. We remain available to meet with representatives of the Local in order to resolve this matter" (Pet. App. 13a, 40a).

On April 2 the Union membership voted to reject the Association's contract proposal; bargaining negotiations were renewed. The Association rejected the Union's request that the lockout be terminated while negotiations continued. The lockout finally ended on April 28, when a new agreement was ratified (Pet. App. 13a, 40a).

2. The Board, upholding the administrative law judge, found that petitioners violated Sections 8(a)(1), (3) and (5) of the Act, 29 U.S.C. 158(a)(1), (3) and (5), by locking out their employees in part because the Union refused to accede to the Association's ratification proposal, which was not a mandatory subject of bargaining (Pet. App. 13a-14a, 45a-47a). By a divided vote the Board further found that the lockout retained its initial taint of illegality despite the Association's letter of April 2, and thus the locked-out employees were entitled to backpay for the full duration of the lockout (Pet. App. 17a-18a).[2]

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[2]The administrative law judge would have ordered backpay only until April 2, when the Association asserted that it was not seeking Union acquiescence in its proposed ratification procedure (Pet. App. 48a-51a).

The Board found that the Association had "failed to dissipate the effects of its unlawful lockout and to restore its employees to the *status quo ante*" (Pet. App. 16a) before attempting to continue the lockout for a lawful economic reason. The Board stated (*ibid.*):

> [The Association] failed to offer reinstatement to the locked-out employees until April 28, never offered backpay for the first 2 days of the lockout, and never acknowledged its own wrongdoing to the employees with regard to the lockout. To the contrary, by the letter of April 1 * * *, [the Association] stated its position that the lockout violated neither the parties' collective bargaining agreement nor the Act and that the locked-out employees were not entitled to backpay. In addition to [the Association]'s failure to affirmatively remedy the illegal lockout, record evidence shows that the injection into bargaining of the lockout issues may well have had some effect on negotiating a new contract. [The Association] acknowledged in the April 1 letter that the Union had taken the position that a lockout would violate the collective-bargaining agreement and that a new contract would not be negotiated until the locked-out employees were paid their lost earnings. The Union negotiators called a union membership meeting at the advent of the unlawful lockout to discuss, *inter alia*, the charge [with the Board] the Union was filing. Finally, the union president, in the March 31 telegram quoted above, demanded at the lockout's outset that [the Association] end the lockout and reinstate the employees in order for the negotiations to continue.

The Board concluded (Pet. App. 16a-17a):

> In these circumstances, without a cessation of the lockout and a restoration of the *status quo ante*,

it is difficult to conclude that any bargaining which ensued was not adversely affected, since the Union was required to negotiate with [the Association] and to ratify the contract from a weakened position induced by the unlawful lockout and the injection of the lockout-related issues into the bargaining process. * * * Similarly, to presume that, if [the Association] had offered reinstatement to the unlawfully locked-out employees on April 2, the lockout would have immediately been resumed on April 3 is speculative. Considering the parties' long history of peaceful labor relations, the smooth negotiations through March 25, the 2 months remaining until the busy season, and the Union's recognition that [the Association] could, after a hiatus, lawfully lockout for economic reasons, it is not unlikely that collectively [*sic*] bargaining free of the unfair labor practice could have resulted in an earlier contract. * * *

3. The court of appeals upheld the Board's decision and enforced its order in full. It first rejected petitioners' argument that the lockout was lawful from its inception (Pet. App. 2a-7a). It then concluded that the Board properly concluded that, in the circumstances of this case, the April 2 letter was insufficient to dissipate the initial illegality (*id.* at 8a):

> We think it dispositive of the issue that the employers here failed to dissipate the effects of their unlawful lockout. There was no offer of reinstatement to the employees until the lockout ended on April 28. The employers never acknowledged their wrongdoing with regard to the lockout and never offered backpay—not even for the first two days of the lockout. Indeed, the employers have always asserted, even on appeal, that the lockout was lawful from the beginning and that the employees were not entitled to backpay. If the employers had offered reinstatement to the unlawfully locked out employees on April 2, it does not necessarily follow that the lockout would have been immediately resumed on April 3. * * *

ARGUMENT

Petitioners do not dispute the Board's finding, upheld by the court of appeals, that the lockout was unlawful at its inception on April 1. They argue only that the taint of the unlawful lockout was dissipated by the Association's letter of April 2. Their contention turns on an evaluation of the particular facts of this case, and review by this Court is unnecessary. See *United States* v. *Johnston*, 268 U.S. 220, 227; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Contrary to petitioners' contention (Pet. 9, emphasis in original), the Board did not apply a "*conclusive presumption* that an unfair labor practice, existing only at the beginning of a lockout, has a continuing impact on bargaining throughout the lockout's duration, regardless of intervening circumstances." Rather, the Board found, and the court of appeals agreed, that the "intervening circumstances" were not sufficient to dissipate the effects of the particular unlawful lockout at issue here. Petitioners did nothing beyond sending a letter on April 2 to break the link between the unlawful inception of the lockout and its continuation. "The employers never acknowledged their wrongdoing with regard to the lockout and never offered backpay—not even for the first two days of the lockout. Indeed, the employers have always asserted, even on appeal, that the lockout was lawful from the beginning and that the employees were not entitled to backpay" (Pet. App. 8a). The Board found that the failure to take these steps had an effect on the subsequent bargaining negotiations.

thereby prolonging the dispute.[3] The Board reasonably concluded that, had petitioners offered reinstatement and backpay for the unlawful lockout,[4] it was not unlikely that the parties would have resumed negotiations with a view toward an early agreement, thereby obviating the need for a resumption of the lockout on April 3. Petitioners argue for an inflexible rule that employers may convert an unlawful lockout to a lawful lockout by doing nothing more than delivering a letter abandoning their unlawful objective. The Board properly concluded, however, that something more—such as a prompt offer to reinstate with backpay—was necessary in the circumstances of this case.[5]

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[3]Although the Board enunciated the general principle that "a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole" (Pet. App. 14a), it did not rest on that principle alone. It proceeded to show that it had validity when applied to the facts of this case.

[4]The normal remedy for an unlawful lockout is reinstatement with backpay. See, *e.g.*, *Bagel Bakers Council of Greater New York*, 174 NLRB 622, 633-634, enforced, 434 F. 2d 884 (C.A. 2), certiorari denied, 402 U.S. 908; *Southern Berverage Co., Inc.*, 171 NLRB 926, 941-942, enforced, 423 F. 2d 720 (C.A. 5).

[5]Petitioners' assertion (Pet. 18-19) that the Board has not required unions to dissipate the coercive effects of unlawful economic coercion before changing to a lawful objective is incorrect. The cases upon which petitioners rely do not stand for that proposition. In *Building and Construction Trades Council of Philadelphia*, 222 NLRB 1276, 1280-1281, the Board found the union's resumed picketing to be lawful where the union not only disclaimed its prior unlawful objective but also ceased all picketing for three weeks. And in *Local 344, Retail Clerks International Association*, 136 NLRB 1270, 1272-1273, all recognitional picketing had ceased five months prior to the effective date of Section 8(b)(7), which banned such activity. And see *Millmen-Cabinet Makers, Industrial Carpenters Union Local 550*, 227 NLRB No. 36, slip op. 5, petition for review pending, C.A. 9, No. 76-2132 (coercive effect of unlawful picketing not dissipated by change in picket signs where there was no hiatus in the picketing).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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